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Meaning of Accountability Under Section 72 of the Youth Criminal Justice Act

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A thesis submitted in partial fulfillment of the requirements for the Master of Studies in Law degree in Law

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Abstract

This study examined judicial decisions, post the 2012 amendments, to determine what drives the accountability analysis under section 72(1)(b). I asked if accountability was equated to retribution as reasoned by the Ontario Court of Appeal, in *R v AO*? Additionally, has the introduction of specific deterrence and denunciation, under section 38(2)(f) had an effect on the accountability analysis? The qualitative results revealed three sets of cases. In each set weight was given to retribution in the accountability analysis. In some cases, retribution was given greater weight to the rehabilitative needs of the young person and in other cases the rehabilitative needs were given equal to or greater weight to retribution. In the first and second group of cases, the courts did not make explicit reference to specific deterrence and denunciation whereas in the third group the addition of specific deterrence and denunciation had an effect on the accountability inquiry.

Keywords

Accountability, Section 72, Youth Criminal Justice Act, Qualitative Analysis, Judicial Decisions

Summary for Lay Audience

Accountability is an undefined concept in the *Youth Criminal Justice Act's* Preamble and as such it is within the courts' jurisdiction to define its meaning. This thesis poses the question: What does it mean to hold a young person accountable for their offending behavior when they engage in behavior that is egregious enough to warrant an adult sentence?

Section 72 is the legislative provision that governs whether a youth justice court can impose an adult sentence on a young person. I explored judicial decisions to determine what drives the accountability inquiry under section 72. In my analysis, I asked if accountability was equated to retribution as reasoned by the Ontario Court of Appeal, in *R v AO*? *R v AO* is an Ontario Court of Appeal decision that reasoned accountability, under section 72, is equated to the adult sentencing principle, retribution.

In 2012, the YCJA was amended to include specific deterrence and denunciation as sentencing principles that a youth court justice “may” consider under section 38. I also asked whether the introduction of specific deterrence and denunciation under section 38(2)(f) had an effect on the accountability analysis under section 72?

The qualitative results revealed three sets of cases. In all three groups weight was given to retribution in the accountability analysis. However, the weight given to retribution differed. In some cases, retribution was given greater weight to the rehabilitative needs of the young person and in other cases the rehabilitative needs of the young person were given equal to or greater weight to retribution. In the first and second group of cases, the courts did not make explicit reference to specific deterrence and denunciation whereas in the third group we see the addition of specific deterrence and denunciation having an effect on the accountability inquiry.

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Chapter 1

1 Introduction

Parliament of Canada, through the *Youth Criminal Justice Act*¹ (YCJA), seeks to promote the protection of the public by addressing: the circumstances underlying a young person's offending behaviour; by rehabilitating and reintegrating young persons in society; and by holding young persons accountable through the imposition of meaningful sanctions related to the harm done.² The YCJA's Preamble states that the central purpose of the YCJA is to hold young people *accountable* for their wrongdoing along with reducing the use of custodial sentences except for young persons who have committed the most serious offences.³

The notion of accountability is mentioned in the Preamble and three of the most significant decisions to be made under the YCJA: whether to divert the young person away from the court (Section 4),⁴ whether to impose a custodial sentence (Sections 3 and 38). The notion of accountability is also mentioned in section 72. Section 72 is the legislative provision that governs whether a youth justice court can impose an adult sentence on a young person and is the focus of this study. Accountability is not defined within the Act. The lack of definition for accountability within the YCJA has left the courts to define its meaning. In this study I ask: What does it mean to hold a young person *accountable*, under section 72, for their offending behaviour when they engage in behaviour that is egregious enough to warrant an adult sentence?

¹ *Youth Criminal Justice Act*, SC 2002, c 1 [YCJA].

² *R v BWP*, 2006 SCC 27 [2006] 1 SCR 941 at para 4 [BWP].

³ YCJA *supra* note 1.

⁴ The courts and law enforcement agents, in Part 1 of the YCJA, are provided with more options for diverting young offenders away from the judicial system, especially first time offenders and those engaging in minor offences. See: Nicholas Bala, "Diversion, Conferencing, and Extrajudicial Measures for Adolescent Offenders" (2003) 40 *Alta L Rev* 991 [Bala].

The case law from the Supreme Court of Canada in *R v BWP*⁵ and the Ontario Court of Appeal in *R v AO*⁶ have been and continue to be of significant assistance to youth court justices who seek to understand the meaning of accountability within the context of section 3, 38, and 72 of the YCJA. The Supreme Court of Canada, in *R v BWP*, considered the meaning of accountability as mandated in Section 38 and held that accountability is not broad enough to encompass deterrence (specific and general)⁷ or denunciation^{8,9}.

The Ontario Court of Appeal, *R v AO*, considered the meaning of accountability under Section 72. The Court of Appeal reasoned that, in this context, accountability is equivalent to the adult principle of retribution; thus, the severity of the offender's sentence should be proportionate to the young person's moral culpability for their offending behaviour.¹⁰ In line with the Supreme Court of Canada, the Ontario Court of Appeal held that when considering the normative character of the offender's conduct,

⁵ *Supra* note 2.

⁶ *R v AO* 2007 ONCA 22 84 OR (3d) 561 [AO].

⁷ Deterrence, as a principle of sentencing, refers to the imposition of a sanction for the purpose of discouraging the "specific" offender and others (potential offenders), from engaging in criminal conduct. When deterrence is aimed at the offender before the court, it is referred to as "specific deterrence". When deterrence is aimed at potential offenders, it is referred to as "general deterrence": See *BWP supra* note 2 at para 2).

⁸ "The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. As Lord Justice Lawton stated in *R v. Sargeant* (1974), 60 Cr. App. R. 74, at p. 77; "society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass": See *R v M(CA)* 1996 1 SCR 500 at para 81.

⁹ *BWP supra* note 2; Lee Tustin and Robert E Lutes, *A Guide to the Youth Criminal Justice Act* (Canada: LexisNexis, 2020) [Tustin & Lutes]; Carla Cesaroni and Nicholas Bala, "Deterrence as a Principle of Youth Sentencing: No Effect on Youth, but a Significant Effect on Judges" (2008) 34 *Queen's L.J* 447 [Cesaroni & Bala].

¹⁰ *AO supra* note 6; Malcolm Thorburn, "Accountability and Proportionality in Youth Criminal Justice" (2009) 55 *Crim L Q* 306 [Thorburn]

youth court justices are required to consider societal values, but without adding an element of denunciation or any notion of deterrence.¹¹

R v BWP and *R v AO* are significant to this study for three reasons: First, both decisions were decided prior to the 2012 amendments to sections 3, 38, and 72 brought forth by Bill C-10, the *Safe Streets and Communities Act*¹² (SSCA). Second, both decisions have been and continue to be influential to courts when interpreting accountability under section 72. The courts before and after the 2012 amendments continue to look to *R v AO* and to a lesser extent *R v BWP* as authoritative guidance when considering the meaning of accountability under section 72(1)(b). Lastly, both courts held that accountability did not encompass elements of denunciation or specific deterrence. The inclusion of specific deterrence and denunciation as sentencing principles that the courts “may” consider under section 38(2)(f) brought forward by Bill C-10 may affect the interpretation of accountability, under the amended section 72.

The YCJA, which was enacted in 2003, was amended in 2012. In 2012 the Government of Canada brought forth amendments under Bill C-10, the SSCA. Bill C-10, among other amendments, amended Section 3 to state that “the youth criminal justice system is intended to protect the public”.¹³ Bill C-10 eliminated the reference to “long-term protection of the public” under Section 3(1)(a),¹⁴ to reflect the Nunn Commission Report which states that the protection of public *should* be one of the goals, not the primary goal.¹⁵

¹¹ *Ibid*; AO *supra* note 6 at para 48.

¹² *Safe Streets and Communities Act*, SC 2012, C 1 [SSCA].

¹³ Tustin & Lutes *supra* note 7 at 34; YCJA *supra* note 1 s 3.

¹⁴ *Ibid* 34; *Ibid*.

¹⁵ *Ibid* 34.

Bill C-10 led to the addition of specific deterrence and denunciation as sentencing principles that a youth court justice *may* consider under section 38(2)(f).¹⁶ The amendments to section 38 (2)(f) were reportedly aimed at strengthening public protection as a primary goal of the YCJA.¹⁷

Bill C-10 brought forward other amendments. For instance, it repealed the presumptive offences (murder, attempted murder, manslaughter, and aggravated sexual assault) that necessitated adult sentencing under section 62. Additionally, it replaced, among other sections¹⁸ 72(1)(a)(b).¹⁹ Section 72 was amended to incorporate the holding in *R v BD*²⁰ wherein “the Supreme Court recognized the presumption of diminished moral culpability as a principle of fundamental justice and held that, there should be no offence for which a youth should be presumptively sentenced as an adult”.²¹

Prior to the 2012 amendments, section 72 (1) instructed:

In making its decision on an application [whether the youth sentence would be sufficient length to hold the young person accountable] heard in accordance with section 71, the youth justice court shall consider the seriousness and circumstances of the offence, and the age, maturity, character, background and previous record of the young person and any other factors that the court considers relevant, and

- (a) if it is of the opinion that a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38

¹⁶ *Ibid*; Ruth Mann, “Canada’s Amended Youth Criminal Justice Act and the Problem of Serious Persistent Youth offenders: Deterrence and the Globalization of Juvenile Justice” (2014) 14 JIJIS 60 [Mann].

¹⁷ Raymond R Corrado & Adrienne M F. Peters. “The Relationship between a Schneider-Based Measure of Remorse and Chronic Offending in a Sample of Incarcerated Young offenders” (2013) 55:1 Can J Corr 102 [Corrado & Peters]

¹⁸ Section 71(1), 72 (1.1), 72(2), 72(3) and 72(5) were replaced.

¹⁹ *Ibid* 160.

²⁰ *R v DB* 2008 SCC 25 2008 2 SCR 3 [BD].

²¹ *Ibid*; *R v MW* 2017 ONCA 22 134 OR (3d) 1 at para 93.

would have sufficient length to hold the young person accountable for his or her offending behaviour, it shall order that the young person is not liable to an adult sentence and that a youth sentence must be imposed; and

- (b) if it is of the opinion that a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not have sufficient length to hold the young person accountable for his or her offending behaviour, it shall order that an adult sentence be imposed.²²

Section 72(1), as amended, states:

The youth justice court shall order an adult sentence be imposed if it is satisfied that

- (a) the presumption of diminished moral blameworthiness or culpability of the young person is rebutted; and
- (b) a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not be of sufficient length to hold the young person accountable for his or her offending behaviour.²³

The amended section 72 is significant to this study as the accountability inquiry is now a two-prong test. Under the amended section 72(1), the consideration of moral blameworthiness is no longer a central focus when considering accountability. It is only when the Crown rebuts the presumption of diminished moral blameworthiness, under section 72(1)(a) that a youth court justice moves onto the accountability inquiry, under section 72(1)(b).

The amendments to section 38 are also significant to this study. Section 72(1)(b), in addition to considering the greater dependency of young persons and their reduced level

²² YCJA, *supra* note 1.

²³ *Ibid.*

of maturity under section 3(1)(b)(ii), must consider section 38 under the accountability inquiry. It is my argument that the introduction of specific deterrence and denunciation will have an effect on how the courts apply the interpretation of accountability that was previously given by the courts in *R v AO* and *R v BWP* under the pre-amended section 72.

This study seeks to examine how youth court justices across Canada have interpreted and applied the meaning of accountability within the amended section 72(1)(b). To answer this question, this study examines judicial decisions, post the 2012 amendments, to determine what drives accountability under section 72(1)(b). I ask, is accountability equated to retribution as reasoned by the Ontario Court of Appeal in *R v AO*? Additionally, what effect has the introduction of deterrence and denunciation, under section 38(2)(f), had on section 72(1)(b)?

There is a dearth²⁴ of systematic content analysis of judicial decisions that have examined how the courts have interpreted and applied the meaning of accountability as mandated by Section 72(1) of the YCJA, in light of the 2012 amendments. This paper seeks to fill this gap in the literature through a content analysis of case law reported in Quicklaw, between 2012 and 2021.

To provide context for the reader when discussing the 2012 amendments to sections 3, 38(2)(f), and 72, I will first provide a brief discussion of the historical shift in youth justice discourse and practice that underlie the *Young Offenders Act*²⁵ (YOA) enacted in 1984 and the YCJA enacted in 2003. The YOA is the predecessor to the YCJA and contained a different sentencing regime. In chapter 2, I will discuss the shift to the YCJA. In Chapter 3, I will outline the statutory context of accountability under the YCJA, post the 2012 amendments. Particular attention will be paid to section 72 both pre and post-2012 amendments.

²⁴ Thorburn examined the meaning of accountability in the context of the YCJA, prior to the 2012 amendments. See Thorburn, *supra* note 8.

²⁵ *Young Offenders Act*, RSC 1985, c Y-1 [YOA]

As previously stated, Parliament has not provided a clear definition of accountability. The case law from the Supreme Court of Canada, *R v BWP*, and the Ontario Court of Appeal, *R v AO*, is and continues to be of significant assistance to youth court judges looking to understand the meaning of accountability within the context of Sections 3, 38, and 72. As such, Chapter 4 will provide a discussion of the meaning of accountability under the YCJA, as reasoned by the Supreme Court of Canada, in *R v BWP*, and the Ontario Court of Appeal, in *R v AO*.

Chapter 5 will outline my research questions and will discuss the methods used to address them. In this chapter I explain the data collection, sampling, and data analysis strategies. This study is based on a qualitative analysis of sentencing decisions, post the 2012 amendments. The choice to use a qualitative analysis stems from the fact that such analysis allows for an enriched understanding of the underlying themes that emerged during the case analysis.

Chapter 6 begins with demographic descriptors. This chapter will report the findings of the qualitative analysis of the sample of cases included in this study. In the final chapter, I will discuss the research findings. Included in this final chapter is my argument as to what group of cases, included in this study, have applied the proper interpretation and application of accountability under section 72(1)(b). I will also provide a discussion of the limitations of this study and considerations for future research.

Chapter 2

2 The *Youth Criminal Justice Act* and *Bill C-10*

In 2003, Canada replaced the YOA with the YCJA. Parliament, in introducing a new sentencing regime sought to promote the protection of the public by holding young persons *accountable* for their actions through meaningful consequences that are proportionate to the seriousness of the offence and the degree or responsibility of the offender and that ensure the effective rehabilitation²⁶ and reintegration of the young person.²⁷

One of the central problems facing youth court justices in Canada, with the enactment of the YCJA was considering: What does it mean to hold a young person accountable?²⁸ The Supreme Court of Canada, *R v BWP*, reasoned that Parliament had created such a different sentencing regime than the YOA that the provisions and precedents decided under it would be of limited value to the meaning of accountability. As stated by the court:

In my view, little can be gained by attempting a detailed comparison of the two statutes. The *YCJA* created such a different sentencing regime that the former provisions of the *YOJA* and the precedents decided under it, including *M.(J.J.)*, are

²⁶ Rehabilitation as a sentencing principle attempts, through treatment or programming, to stop offenders from continuing to offend. It is “a crime prevention strategy rooted in the notion that offenders can change and lead crime-free lives in the community”: See Cheryl M Webster, Limits of Justice: The role of the criminal justice system in reducing crime. In Bruce Kidd & Jim Phillips (Eds.). *Research on Community Safety*. (Toronto: Centre of Criminology, University of Toronto 2004) at pgs 96-124 as cited in The Review of the Roots of Youth Violence 2008 Vol 5
<http://www.children.gov.on.ca/htdocs/English/professionals/oyap/roots/index.aspx>

²⁷ YCJA *supra* note 1. Brock Jones, Emma Rhodes, & Mary Birdsell, *Prosecuting and Defending Youth Criminal Justice Cases: A Practitioner’s Handbook* 2016 Toronto: Emond, 2016); Tustin & Lutes, *supra* note 7; *R v SNJS* 2013 BCCA 379 [SNJS]; *R v Ferriman* 2006 OJ No 3590 2006 CanLII 33472 [Ferriman].

²⁸ Thorburn *supra* note 8 at 307.

of limited value. In order to determine the question before the Court, the focus must be rather on the relevant provisions of the new statute.²⁹

The YCJA, when enacted, sought to fulfil two primary objectives.³⁰ First, the Act facilitated the process for imposing a more severe, adult sentence for the small number of youths found guilty of the most serious violent offences.³¹ When first enacted, the YCJA prescribed a series of *presumptive offences* that necessitated adult sentencing. These included murder, attempted murder, manslaughter, and aggravated sexual assault. These presumptions were deemed unconstitutional in the Supreme Court of Canada decision *R v BD*³² and were repealed from the Act in 2012.

In addition, there was a move towards keeping the vast majority of young persons who commit less serious offences out of the court system and youth custody.³³ Canada under the YOA had one of the highest rates in the world of per capita use of courts and custody³⁴ for adolescent offenders.³⁵ The YOA had granted considerable discretion to provinces concerning how the Act would be implemented, and in many provinces this

²⁹ BWP *supra* note 2 at para 21

³⁰ Julian V Roberts and Nicholas Bala, “Understanding Sentencing Under the Youth Criminal Justice Act” (2003) 41 Alta L Rev 395 at 396 [Roberts & Bala].

³¹ *Ibid* at 396.

³² BD *supra* note 16.

³³ Roberts & Bala *supra* note 25 at 396.

³⁴ As noted by Julian V Roberts and Nicholas Bala “There are significant methodological difficulties in accurately comparing rates of use of youth custody between countries, but at the time of unveiling the YCJA the federal government produced statistics to support the conclusion that Canada’s use of courts and custody for adolescent offenders was higher than that of other industrialized countries. See Canada, Minister of Justice, A Strategy for the Renewal of Youth Justice (Ottawa: Department of Justice, 1998) at 20, and The Youth Criminal Justice Act: Summary and Background (Ottawa: Department of Justice, 2002) at 9 [Summary and Background]. These two documents set out the government’s objectives in enacting the YCJA”. See also Jane B. Sprott & Howard N. Snyder, “A Comparison of Youth Crime in Canada and the United States” (1999) 32 Crimolo 55; *Ibid* at 396.

³⁵ *Ibid* at 396; Tustin & Roberts *supra* note 7.

discretion led to high rates of custodial sentencing for young offenders.³⁶ For example, in 1997/1999 under the YOA 121,000 youths between the ages of 12 to 17 were charged with a Criminal Code or other federal offences. Of those charges that proceeded to youth court, just over two thirds (67%) of the cases resulted in a finding of guilt.³⁷ In 34 percent of youth cases the young offender received a conviction sentence that entailed a custodial disposition.³⁸ As noted, sentencing varied across provinces as such a young offender who resided in Ontario, the Yukon, the Northwest Territories, or Prince Edward Island was more likely to serve time in custody. For example, in Ontario 10,999 (41%) of the 27,033 young persons convicted of an offence in 1997/98 received a custodial sentence.³⁹

There were no parole provisions under the YOA and as a result young persons who were sentenced to incarceration remained in a custodial facility until the end of their sentence, unless upon judicial review their sentence was modified.⁴⁰ In some instances, this led to harsher penalties for youth as compared to adults who were sentenced for similar offences. For example, a study conducted by the John Howard Society compared custodial sentences received by adults and youths for similar crimes (e.g., theft under \$5000).⁴¹ This study found that if a youth and an adult were given the maximum sentence of two years, the adult could be paroled after serving one-third (33%) of the sentence while a youth, in comparison, was only able to have their sentences modified after a

³⁶ Bala *supra* note 4; Nicholas Bala, Peter J Carrington, & Julian V Roberts, “Evaluating the Youth Criminal Justice Act After Five Years: A Qualified Success” (2009) 51:2 Can J Corr 131 [Bala, Carrington & Roberts]; Anthony Doob & Carla Cesaroni, *Responding to Youth Crime in Canada* (Toronto: University of Toronto Press, 2004) [Doob & Cesaroni 2004]. Anthony N Doob & Jane B Sprott, “Youth Justice in Canada” (2004) 31 Crime and Justice 185.

³⁷ Canadian Centre for Justice Statistics, *The Justice Fact Finder 1997*, by R Kong Vol 17 no 8. Ottawa: Statistics Canada 1999; John Howard Society of Alberta, *Harsh Reality of the Young Offenders Act*, (1999) at 7 [JHS].

³⁸ Statistics Canada, *Youth Court Statistics, 1999*, by Mark Sudworth & Paul deSouza, Catalogue no. 85-002-XPE Vol 21 no 3. Ottawa: Statistics Canada, May 2001; *Ibid*.

³⁹ *Ibid* at 7.

⁴⁰ Bala, Carrington, & Roberts *supra* note 33.

⁴¹ JHS *supra* note 34 at 4.

judicial review that was permitted after serving one year -- 50% of their sentence.⁴² Furthermore, because judicial reviews were difficult to arrange, they rarely occurred.⁴³ Even in cases where a review hearing was held, some judges were reluctant to modify a young offender's sentence.⁴⁴

Since its introduction, the YCJA has received both praise and criticism. Proponents of the Act, supported by statistics, have noted that it has significantly reduced the rates of incarceration among youth, especially those who have committed less serious offences.⁴⁵ However, critics of the YCJA felt the Act was far too lenient. When the Conservative government came into power in 2006, the newly elected party lobbied for harsher sentencing of young persons, arguing harsher sentences would have the effect of deterring youth from committing crimes. As such, in 2012 the Conservative government amended the YCJA as part of the government's larger and ongoing 'tough-on-crime' agenda.⁴⁶ As a result Bill C-10, tabled as the SSCA, came into force on October 23, 2012.⁴⁷

2.1 *Youth Criminal Justice Act: 2012 Amendments*

The 2012 amendments signaled an important policy direction for youth justice in the following ways. First, Bill C-10 amended Section 3 to state "the youth criminal justice system is intended to protect the public".⁴⁸ Bill C-10 replaced the reference to "long-term protection of the public" with the "short-term protection of the public" under Section

⁴² *Ibid.*

⁴³ Bala *supra* note 4; Bala, Carrington & Roberts *supra* note 33.

⁴⁴ *Ibid.*

⁴⁵ Bala, Carrington & Roberts, *supra* note 31; Statistics Canada, *Youth Court Statistics, 2006/2007*, by Jennifer Thomas (Canadian Centre for Justice Statistics) online: <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/85-002-x2008004-eng.pdf?st=EZF1rrYq>

⁴⁶ Mann *supra* note 20.

⁴⁷ Tustin & Lutes *supra* note 7 at 25

⁴⁸ *Ibid* at 34; YCJA *supra* note 1

3(1)(a).⁴⁹ This amendment reflected the Nunn Commission Report which stated that the protection of public should be one of the goals of the Act, not the primary goal.⁵⁰

Bill C-10 led to the addition of specific deterrence and denunciation as sentencing principles a youth court justice ‘may’ consider under section 38(2)(f).⁵¹ The amendments to section 38 (2)(f) were reportedly aimed at strengthening public protection as a primary goal of the YCJA.⁵²

Bill C-10 repealed the definition of “presumptive offence” (murder, attempted murder, manslaughter, and aggravated sexual assault) .⁵³ Section 72, along with all associated sections, was replaced.⁵⁴ In considering accountability, under section 72, prior to the 2012 amendments, youth court justices were instructed:

In making its decision on an application [whether the youth sentence would be long enough to hold a young person accountable] heard in accordance with section 71, the youth justice court shall consider the seriousness and circumstances of the offence, and the age, maturity, character, background and previous record of the young person and any other factors that the court considers relevant, and

- (a) if it is of the opinion that a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would have sufficient length to hold the young person accountable for his or

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid*; Mann *supra* note 20 at 60.

⁵² Raymond R. Corrado and Adrienne M. F. Peters. “The Relationship between a Schneider-Based Measure of Remorse and Chronic Offending in a Sample of Incarcerated Young offenders” (2013) 55:1 Can J Corr at page 102 [Corrado & Peters].

⁵³ *Ibid* at 160.

⁵⁴ Tustin & Lutes *supra* 7 at 160.

her offending behaviour, it shall order that the young person is not liable to an adult sentence and that a youth sentence must be imposed; and

- (b) if it is of the opinion that a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not have sufficient length to hold the young person accountable for his or her offending behaviour, it shall order that an adult sentence be imposed.⁵⁵

Section 72 was amended by Bill C-10 to incorporate the holding in *R v BD* wherein “the Supreme Court recognized the presumption of diminished moral culpability as a principle of fundamental justice and held that, there should be no offence for which a youth should be presumptively sentenced as an adult”.⁵⁶ Prior to this amendment, the YCJA placed the onus on the young person convicted of specific presumptive offences (murder, attempted murder, manslaughter, aggravated sexual assault, or a third serious violent offence) to satisfy the court that a youth sentence would be of sufficient length to hold them accountable. Thus, at issue in *R v BD* was the previous enacted version of section 72 that imposed a “reverse onus” - the burden was on the young person to persuade the court that they should not lose the benefit of the youth sentencing provisions.⁵⁷

The Supreme Court of Canada, in *R v BD* found that “the onus on young persons to displace the presumption of an adult sentence for presumptive offences [was] a violation of s. 7 [of the Charter]”.⁵⁸ This ruling does not mean that young persons who comes in conflict with the law are not accountable for the offences they commit or less accountable

⁵⁵ YCJA *supra* note 1.

⁵⁶ *BD supra* note 16; *WM supra* note 19 at 93.

⁵⁷ *Ibid* at para 24.

⁵⁸ *Ibid*, at at para 36.

for serious offences.⁵⁹ Rather, as Justice Abella states “they are decidedly but differently accountable”.⁶⁰

The Crown may still persuade a youth court judge that an adult sentence or the lifting of a publication ban is warranted where a serious crime has been committed. And young persons will continue to be accountable in accordance with their personal circumstances and the seriousness of the offence. But the burden of demonstrating that more serious consequences are warranted will be, as it properly is for adults, on the Crown.⁶¹

The Supreme Court’s decision in *R v BD* “served as a catalyst for the legislative reforms which gave life to the presently worded version of section 72 of the Act”.⁶² The presumption of diminished moral blameworthiness was codified in part 72(1)(a). In addition, Parliament removed the list of itemized considerations from section 72(1) (i.e., “the age, maturity, character, background and previous record of the young person and any other factors that the court considered relevant”). Lastly, “it altered the structure of the test by entrenching two separate prongs”.⁶³

Section 72(1), as amended, states:

The youth justice court shall order an adult sentence be imposed if it is satisfied that

- (a) the presumption of diminished moral blameworthiness or culpability of the young person is rebutted; and
- (b) a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not be of sufficient

⁵⁹ *Ibid*, at para 1.

⁶⁰ *Ibid*.

⁶¹ *Ibid* at para 94

⁶² *R v Henderson* 2018 SJ 142 2018 SKPC 27 at para. 34 [Henderson].

⁶³ *R v RDF* 2018 SJ 199 at para 217; *R v RDF* 2019 SCKA 112 382 CCC (3d) 1 [RDF].

length to hold the young person accountable for his or her offending behaviour.⁶⁴

I argue that the statutory changes to section 72 along with the addition of specific deterrence and denunciation under section 38(2)(f), brought forth by Bill C-10 in 2012 will have an effect on the interpretation and application of the meaning of accountability under the amended section 72, as reasoned by *R v BWP* and *R v AO*.

Before outlining the statutory context of accountability in Chapter 3 and the meaning of accountability under the YCJA pre-2012 in Chapter 4, I will discuss an issue faced by youth court justices surrounding the consideration of deterrence under the YOA and the YCJA, pre-2012 amendments. The role of deterrence has been an issue faced by youth court justices both under the YOA and the YCJA (pre-2012 amendments). Deterrence was not an explicit sentencing principle under the YOA and the YCJA, pre-2012 amendments. The Supreme Court of Canada in 1993 held that general deterrence *should* be a consideration in sentence, even though deterrence was not an explicit sentencing principle under the YOA.

The ambiguous sentencing philosophy of the YOA and the role of deterrence became an issue, which the Supreme Court of Canada, *R. v. J.J.M* addressed in in 1993.⁶⁵ The Supreme Court ruled that even though deterrence was not an explicit sentencing principle in the YOA, general deterrence *should* be considered in sentencing, albeit to a lesser extent than it is for adult offenders.⁶⁶ The court stated:

There is a reason to believe that Young Offenders Act dispositions can have an effective deterrent effect. The crimes committed by the young tend to be a group activity. The group lends support and assistance to the prime offenders. The criminological literature is clear that about 80 percent of juvenile delinquency is a

⁶⁴ YCJA *supra* note 1.

⁶⁵ Corrado & Peters *supra* note 60 at page 542.

⁶⁶ *R v M(JJ)* 1993 2 SCR 421 1993 2 RCS 421 at para. 30 [MJJ].

group activity, whether as part of an organized gang or with an informal group of accomplices. See Maurice Cusson in *Why delinquency?* (1983) at pp. 138-39 and Franklin E. Zimring “Kids, Groups and Crime” (1981), 72 *J. Crim. L. & Criminology* 867. If the activity of the group is criminal then the disposition imposed on an individual member of the group should be such that it will *deter other members of the group* [emphasis added]. For example the *sentence imposed on one member of a “swarming group” should serve to deter others in the gang* [emphasis added].⁶⁷

In 2006 the Supreme Court of Canada ruled that deterrence *should not* be a guiding principle under the YCJA, pre-2012 amendments. The Ontario Court of Appeal in 2007 held that even under section 72 (whether to impose an adult sentence) *deterrence* should not be a sentencing principle.

Despite the enactment of the YCJA in 2003 and Parliament excluding any reference to general or specific deterrence as objectives of sentencing, the debate whether to consider deterrence continued amongst youth court justices. In 2006 this debate was resolved by the Supreme Court of Canada decision *R v BWP*. The Supreme Court held that while deterrence was a guiding principle under the YOA, it was *not* to be an approach that should be followed in responding to youth crime, under the YCJA.⁶⁸ Similarly, in *R v AO*, the Ontario Court of Appeal held that deterrence (general and specific) and denunciation were *not* encompassed under the meaning of accountability even under section 72 (whether an adult sentence should be imposed).

The relevance of the introduction of specific deterrence and denunciation, brought forward by Bill C-10, are of importance as such additions may have an effect on the interpretation of accountability under the amended section 72(1) in the decisions after 2012. The debate of such inclusions may continue especially under section 72 as

⁶⁷ *Ibid* at para. 30.

⁶⁸ Cesaroni & Bala *supra* note 7. Nicholas Bala & Sanjeev Anand, *Youth Criminal Justice Law*. 3rd ed. (Toronto: Irwin Law Inc, 2012) at 142 [Bala and Anand, 2012].

deterrence (along with denunciation) “may”, not must, be a consideration under section 38(2)(f).

Chapter 3

3 Accountability and the YCJA

The purpose of this study is to examine the interpretation and application of accountability under section 72, post the 2012 amendments. In addition, this study seeks to examine whether the added principles to section 38(2)(f), specific deterrence and denunciation, have had an effect on the interpretation of accountability mandated by section 72. In this chapter, I will outline the statutory context of accountability, as amended by Bill C-10.

Accountability is the driving force of the YCJA. The notion of accountability is mentioned in the Preamble and in three of the most significant decisions to be made under the YCJA: whether to divert the young person away from the court (Section 4); whether to impose a custodial sentence under Section 3 and 38; and whether to sentence a young person as an adult under Section 72.

The Preamble states:

Canadian society should have a youth criminal justice system, that commands respect, takes into account the interests of the victims, fosters responsibility and ensures accountability through meaningful consequences and effective rehabilitation and reintegration, and that reserves its most serious intervention for the most serious crimes and reduces the over-reliance on incarceration for non-violent persons.⁶⁹

Accountability is also mentioned in section 3, which outlines the fundamental underlying principles of the YCJA. Section 3(1) is important as the Act in its entirety is to be viewed through the lens of this section. Section 3(1) states the following principles apply in this Act:

⁶⁹ YCJA *supra* note 1.

- (a) the youth criminal justice system is intended to protect the public by
 - (i) holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person,
 - (ii) promoting the rehabilitation of young persons who have committed offences, and
 - (iii) supporting the prevention of crime by referring young person to programs or agencies in the community to address the circumstances underlying their offending behaviour;
- (b) the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:
 - (i) rehabilitation and reintegration
 - (ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
 - (iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,
 - (iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and
 - (v) the promptness and speed, with which persons responsible for enforcing this Act must act, given young persons' perception of time;
- (c) within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should
 - (i) reinforce respect for societal values

- (ii) encourage the repair of harm done to victims and the community,
 - (iii) be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community, and social or other agencies in the young person's rehabilitation and reintegration, and
 - (iv) respect gender, ethnic, cultural, and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements; and
- (d) special considerations apply in respect of proceedings against young persons and, in particular,
- (i) young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms,
 - (ii) victims should be treated with courtesy, compassion, and respect for their dignity and privacy and should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system,
 - (iii) victims should be provided with information about the proceedings and given an opportunity to participate and be heard, and
 - (iv) parents should be informed of measures or proceedings involving their children and encouraged to support them in addressing their offending behaviour.

Section 4 seeks to hold young persons *accountable* without proceeding through the formal court process. This section strengthens the use of extrajudicial measures by providing the courts and law enforcement agents with additional options for diverting

young offenders away from the judicial system, especially in regards to first-time offenders and those engaging in minor offences.⁷⁰ Prior to a judicial process the police, the Crown, and the court are to consider extrajudicial measures.⁷¹ The principle underlying the use of extrajudicial measures is to ensure that a young person will be held *accountable* without proceeding through the formal court process. These amendments “are clear that extrajudicial measures are to be considered, with some exceptions as stated in section 4.1 (a)(b) such as a risk of harm or risk to public safety”.⁷²

Accountability is also referenced in section 38 which delineates the purposes and principles of sentencing. Section 38 seeks to balance and add consistency when sentencing youths in Canada.⁷³ This section instructs that a “youth justice court that imposes a youth sentence on a young person shall determine that sentence in accordance with the principles set out in section 3”.⁷⁴

Section 38 also seeks to reinforce the purpose of sentencing, which is to hold a young person accountable for the offence through meaningful consequences that promote their rehabilitation and reintegration into society, thereby contributing to the protection of society. Section 38 (1) reads as follows:

The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.⁷⁵

⁷⁰ Bala *supra* note 4.

⁷¹ Tustin and Lutes *supra* note 7 at 43.

⁷² *Ibid* at 43.

⁷³ *Ibid* at 103.

⁷⁴ YCJA *supra* note 1.

⁷⁵ *Ibid*.

Section 38 (2) sets out the specific principles to guide the sentencing of young persons and reads as follows:

- (a) the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence in similar circumstances;
- (b) the sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances;
- (c) the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence;
- (d) all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons;
- (e) subject to paragraph (c), the sentence must
 - (i) be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1),
 - (ii) be the one that is most likely to rehabilitate the young person and reintegrate him or her into society, and
 - (iii) promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community;
- (e. 1) if this Act provides that a young justice court may impose conditions as part of the sentence, a condition may be imposed only if
 - (i) the imposition of the condition is necessary to achieve the purpose set out in subsection 38(1),

- (ii) the young person will reasonably be able to comply with the condition, and
 - (iii) the condition is not used as a substitute for appropriate child protection, mental health or other social measures; and
- (f) subject to paragraph (c), the sentence may have the following objectives:
- (i) to denounce unlawful conduct, and
 - (ii) to deter the young person from committing offences

Section 38(3) sets out the factors to be considered in determining a youth sentence. Section 38(3) states:

In determining a youth sentence, the youth justice court shall take into account

- a) the degree of participation by the young person in the commission of the offence;
- b) the harm done to victims and whether it was intentional or reasonably foreseeable;
- c) any reparation made by the young person to the victim or the community;
- d) the time spent in detention by the young person as a result of the offence;
- e) the previous findings of guilt of the young person; and
- f) any other aggravating and mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles set out in this section.⁷⁶

⁷⁶ YCJA *supra* note 1; SCA *supra* note 10.

Accountability is a fundamental principle embedded within section 72, which governs whether a youth justice court shall impose an adult sentence on a young person. The sentencing provisions in the *Criminal Code of Canada*⁷⁷ do not apply to a young person except where the youth justice court imposes an adult sentence for a young person.⁷⁸ Under section 72, youth court justices can consider whether a young person should be held equally accountable as an adult. A youth court judge may only sentence a young person as an adult if the court finds that the test as set out in section 72(1) has been met.

The 2012 legislative amendments brought forth by Bill C-10 “altered the structure of the test by entrenching two separate prongs”.⁷⁹ Prior to the 2012 amendments, the courts consistently followed a blended analysis of moral blameworthiness and accountability. When considering accountability, youth court justices were required to consider the moral blameworthiness and culpability of the young person and his or her diminished capacity as well as the nature and seriousness of the offence.⁸⁰

Section 72(1), as amended, states:

The youth justice court shall order an adult sentence be imposed if it is satisfied that

- (a) the presumption of diminished moral blameworthiness or culpability of the young person is rebutted; and
- (b) a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not be of sufficient

⁷⁷ *Criminal Code*, RSC 1985, c C-46.

⁷⁸ Tustin & Lutes *supra* note 7 at 163.

⁷⁹ RDF *supra* note 60 at para 217.

⁸⁰ Jamie Campbell, 2015 “In Search of the Mature Sixteen Year Old in Youth Justice Court” (2015) 19:1 CCLR at 49.

length to hold the young person accountable for his or her offending behaviour.⁸¹

It is only when the Crown rebuts the “presumption prong” under section 72(1)(a) that a youth court justice moves onto the “accountability prong” under section 72(1)(b).

After the 2012 amendments there was a debate amongst youth court justices whether the courts were to continue to engage in a blended analysis or whether the provision should be interpreted as a two-prong test. This debate has been settled; the case law is clear that section 72 is a two-prong test.

R v MW, a leading Ontario Court of Appeal decision regarding two appellants (MW and TF) was heard after the 2012 amendments. This decision considered whether section 72(1) should be a blended analysis or a two-pronged test. Justice Epstein, writing on behalf of the Ontario Court of Appeal, stated “the pre-2012 test was set out in a way that allowed for a blended analysis of the presumption and accountability, whereas the new test is expressly structured as a two-pronged test in which the Crown must satisfy both prongs”.⁸² Thus, to rebut the presumption (presumption prong), the Crown must satisfy to the court that the evidence supports a finding that the young person demonstrated a level of maturity, moral sophistication and capacity for independent judgement of an adult, at the time of the offence.⁸³ Accountability, according to the Court of Appeal is reflected in section 72 (1)(b): the second inquiry (accountability prong). To succeed in justifying an adult sentence, both prongs mentioned in section 72(1) must be satisfied.

While the two prongs may address related but distinct questions and the factors (e.g., seriousness and circumstances of the offence, age, maturity, character, background, and previous record) considered may be applicable to both questions, there is not a complete

⁸¹ YCJA *supra* note 1.

⁸² MW *supra* note 19 at para. 94.

⁸³ *Ibid* at para. 98.

overlap of the two prongs and therefore a separate analysis is to be undertaken.⁸⁴ The Ontario Court of Appeal in *R v MW* held that the amendments to section 72 were substantive; that is section 72 became a “two-pronged test” rather than a “blended test”. This two-step inquiry has been endorsed by other courts as illustrated below.

The Manitoba Court of Appeal decision, *R v Okemow* agreed with the Ontario Court of Appeal that the test under section 72(1) should be read as a two-prong test. The Appeal court noted the “controversy as to whether a youth justice court judge is to take a blended analysis of [the amended version of section 72(1)]; moral blameworthiness (s. 72[1][a]) and accountability (s. 72[1][b])”.⁸⁵ The Appeal Court agreed with *R v MW* that the “Crown’s onus under section 72(1) of the YCJA is a two-prong test involve[s] separate inquiries but where there is some overlap in the relevant factors to consider.”⁸⁶

The British Columbia Court of Appeal, in *R v Choi*⁸⁷ was also in agreement with *R v MW* that section 72 is to be a two-prong test stating “I agree with the Ontario Court of Appeal that, while there is a significant overlap between the factors to be considered, the two prongs of the test should be considered separately because some factors may apply to only one prong. Conducting a blended analysis creates a risk that “a factor relevant only to one of the two prongs may be relied upon to support a finding in relation to the other”.⁸⁸

While it is clear from the case law that section 72 is to be considered a two-pronged test, an unanswered question remains: What does it mean under section 72(1)(b) to hold a young person *accountable* for their offending behaviour when they engage in behaviour that is egregious enough to warrant an adult sentence?

⁸⁴ *Ibid* at para 95.

⁸⁵ *R v. Okemow* 2017 MBCA 59 2017 11 WWR 425 at para. 52 [Okemow].

⁸⁶ *Ibid* at para. 52.

⁸⁷ *R v Choi* 2018 BCJ 859 BCSC 1709; *R v Choi* 2018 BCCA 179 [Choi].

⁸⁸ *Ibid*.

Chapter 4

4 Meaning of Accountability Under the YCJA: Pre-2012 Amendments

This study seeks to examine the interpretation and application of accountability as mandated by section 72, post the 2012 amendments. Before beginning the analysis, I have drawn upon two leading and influential decisions which were tasked with defining accountability, prior to the 2012 amendments. The first case is the Supreme Court of Canada decision *R v BWP* and the second case is the Ontario Court of Appeal decision *R v AO*. Both cases have continued to be of assistance to the courts even after the 2012 amendments and as such will be discussed in this chapter.

The decisions *R v BWP* and *R v AO* are significant to this study for three reasons: First, both decisions were decided prior to the 2012 amendments to sections 3, 38, and 72 brought forth by Bill C-10, the SSCA. These amendments led to a change in the test under section 72 and introduced specific deterrence and denunciation as sentencing principles that youth court justices “may” consider under section 38(2)(f). Second, both decisions have been and continue to be influential to courts when interpreting accountability under section 72. The courts before and after the 2012 amendments continue to look to *R v AO* and to a lesser extent *R v BWP* as authoritative guidance when considering the meaning of accountability under section 72(1)(b). Third, both the Supreme Court of Canada and the Ontario Court of Appeal held that accountability did not encompass elements of denunciation or deterrence (general and specific). As such the inclusion of specific deterrence and denunciation as sentencing principles the courts may consider under section 38(2)(f) brought forward by Bill C-10 may have an effect on the interpretation of accountability, under the amended section 72.

4.1 R v BWP

The Supreme Court of Canada in *R v BWP* heard two appeals. Both appeals raised the same question of statutory interpretation: whether deterrence or some equivalent concept could be found in the words of the YCJA.⁸⁹ The Crown, in both cases, submitted that Parliament while emphasizing rehabilitation had also recognized the need for “long-term protection of the public as a purpose of sentencing... both speak of “meaningful consequences” ... [The] statute [also] speaks of “accountability” which, it is submitted, is a sufficiently broad concept to encompass considerations of general deterrence”.⁹⁰ Thus, the Crown proposed that the phrases “protection of society”, “accountability”, and “meaningful consequences” were broad enough to encompass general deterrence as a factor to be considered upon sentencing under sections 3 and 38 of the YCJA.

Justice Charron, writing on behalf of the court dismissed both appeals stating “I am unable to find in these provisions a basis for imposing a harsher sanction that would otherwise be called for to deter *others* from committing crime.”⁹¹ Relying upon the Preamble to the YCJA, the Declarations of Principles (section 3), the Sentencing Principles (Section 38) and the specific words of Section 50, Justice Charron wrote:

The YCJA introduced a new sentencing regime. As I will explain, it sets out a detailed and complete code for sentencing young persons under which terms it is not open to the youth sentencing judge to impose a punishment for the purpose of warning, not the young person, but others against engaging in criminal conduct. Hence, general deterrence is not a principle of youth sentencing under the present regime. The YCJA also does not speak of specific deterrence. Rather, Parliament has sought to promote the long-term protection of the public by [requiring an individualized processes] [to address] the circumstances underlying the offending

⁸⁹ *BWP supra* note 2 at para 23.

⁹⁰ *Ibid* at para 35.

⁹¹ *Ibid* at para 30

behaviour, by rehabilitating and reintegrating young persons into society and by holding young persons accountable through the imposition of meaningful sanctions related to the harm done. Undoubtedly, the sentence may have the effect of deterring the young person and others from committing crimes. But, by policy choice I conclude that Parliament has not included deterrence as a basis for imposing a sanction under the YCJA.⁹²

Further, the Supreme Court determined that accountability is not broad enough to encompass general deterrence. Instead, when the statute speaks of “accountability” or requires that “meaningful consequences” be imposed, Justice Charron states:

when the statute speaks of “accountability” or requires that “meaningful consequences” be imposed, the language expressly targets the young offender before the court: “ensure that a young person is subject to meaningful consequences” (s. 3(1)(a)(iii); “accountability that is consistent with the greater dependency of young persons and their reduced level of maturity” (s. 3(1)(b)(ii)); “be meaningful for the individual young person given his or her needs and level of development” (s. 3(1)(c)(iii)). Parliament has made it equally clear in the French version that these principles are offender-centric and not aimed at the general public.⁹³

The court also held that:

The new sentencing regime does not speak of specific deterrence as a distinct factor in sentencing. Rather, Parliament has specifically and expressly directed how preventing the young offender from re-offending should be achieved, namely by addressing the circumstances underlying a young person’s offending behaviour through rehabilitation and reintegration and by reserving custodial sanctions solely for the most serious crimes. In my view, nothing further would be gained in trying

⁹² *Ibid* at para 4.

⁹³ *Ibid* at para 33.

to fit specific deterrence, as a distinct factor, by implying it in some way under the new regime.⁹⁴

Thus, after considering the general objective and scheme of the YCJA, Parliament's intention in passing it, and jurisprudence (*R v CD* 2005 SCR 668, 2005 SCC 78),⁹⁵ Justice Charron concluded that "deterrence, general or specific, is not a principle of sentencing under the YCJA".⁹⁶

4.2 *R v AO*

R v AO, an Ontario Court of Appeal decision, is the leading decision that addresses the meaning of accountability under section 72, of the *YCJA*.⁹⁷ The Ontario Court of Appeal, in line with the Supreme Court of Canada reasoned that accountability as mandated under section 72(1)(b) did not encompass deterrence. In addressing the combined effect of sections 72, 3, and 38 the Appeal Court of Ontario stated:

The combined effect of ss.72, 3, and 38 is to identify accountability as the purpose that the youth court judge must consider when deciding an application to impose an adult sentence on a young person. Accountability is achieved through the imposition of meaningful consequences for the offender and sanctions that promote his or her rehabilitation and reintegration into society. The purpose of accountability in this context would seem to exclude accountability to society in any larger sense or *any notion of deterrence* [emphasis added].⁹⁸

⁹⁴ *Ibid.*

⁹⁵ The Supreme Court of Canada heard an appeal in relation to the definition of "violent offence". The court defined "violent offence" as "an offence in the commission of which a young person causes, attempts to cause or threatens to cause bodily harm" (see Tustin & Lute, *supra* note 7 at page 29; *R v CD* SCC 688 at para 17 and 70).

⁹⁶ *Ibid* at para. 41.

⁹⁷ Thorburn *supra* note 8 at 310.

⁹⁸ *AO supra* note 6 at para 42.

This meaning of accountability seems to be inconsistent with a purely retributive understanding of accountability. Despite endorsing that “accountability is achieved through the imposition of meaningful consequences for the offender and sanctions that promote his or her rehabilitation and reintegration into society”, the Appeal Court focused primarily on retribution and not rehabilitation in its decision.

The Ontario Court of Appeal held that the meaning of accountability in the context of section 72 was equivalent to the adult sentencing principle of retribution. Drawing on Justice Lamer in *R v M (CA)*,⁹⁹ the Court of Appeal stated:

Retribution represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender’s conduct... [it] incorporates a principle of restraint... [and] requires the imposition of a just and appropriate punishment, and nothing more.¹⁰⁰

The Appeal Court stated that “the need to consider the normative character¹⁰¹ of an offender’s behaviour necessarily requires the court to consider societal values”.¹⁰² Further, the court stipulated that the normative character of the offender’s conduct is to

⁹⁹ The Supreme Court of Canada in *R v CAM* held that “Retribution is an accepted, and indeed important, principle of sentencing in our criminal law. As an objective of sentencing, it represents nothing less than the hallowed principle that criminal punishment, in addition to advancing utilitarian considerations related to deterrence and rehabilitation, should also be imposed to sanction the moral culpability of the offender. Retribution represents an important unifying principle of our penal law by offering an essential conceptual link between the attribution of criminal liability and the imposition of criminal sanctions. The legitimacy of retribution as a principle of sentencing has often been questioned as a result of its unfortunate association with “vengeance” in common parlance, but retribution bears little relation to vengeance. Retribution should also be conceptually distinguished from its legitimate sibling, denunciation. Retribution requires that a judicial sentence properly reflect the moral blameworthiness of the particular offender” (See: *R v M(CA)* 1996 1 SCR 500 [1996] SCJ No 28, 105 CCC (3d) 327 at paras 80 and 81 [CA]).

¹⁰⁰ AO *supra* note 6 at para 46.

¹⁰¹ Drawing on *R v JM* 2004 OJ 2796 at para. 26 and Ferriman, *supra* note 24 at para. 38, the Appeal Court reads normative character as reflecting the seriousness of the offence and the accused role in it. (See AO, *supra* note 6 at para 50).

¹⁰² *Ibid* at para 48.

be specific to the offending behaviour and proportionate to the seriousness of the offence and the accused role in it.¹⁰³ Retribution in the context of societal values is “conceptually distinguished from its legitimate sibling, denunciation,”¹⁰⁴ and any notion of deterrence.

The Ontario Court of Appeal, *R v AO*, has been and continues to be a persuasive precedent that continues to be endorsed by other provinces even after the 2012 amendments and the addition of specific deterrence and denunciation under section 38(2)(f). For instance, in *R v Bird*, a 2008 Alberta Court of Queen’s Bench decision, drawing on *AO* stated:

Accountability requires “just sanctions that have meaningful consequences for the young person” (YCJA, s. 38(1)). The nature of accountability under the YCJA was considered in *R. v. A.O.*, 2007 ONCA 144 at para. 47, 84 O.R. (3d) 561 [“A.O.”]. The Court concluded that the concept does not include deterrence, in either a general or an individual sense. Sentencing under the YCJA focuses on the young person before the court, but that does not mean the sentence is concerned only with the rehabilitation of the young person. To provide accountability, a sentence must reflect the “moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender’s conduct.” (at para. 47).¹⁰⁵

In *R v Smith*, a Nova Scotia Court of Appeal decision referenced *R v AO* stating: “The Ontario Court of Appeal provides guidance in *R v A.O.* [2007] O.J. No. 800, 2007 ONCA 144 as to how these statutory provisions [sections 72, 3(1)(b)(i) and 38] are to be interpreted”.¹⁰⁶

¹⁰³ *Ibid* at para 52.

¹⁰⁴ *Ibid* at para 42.

¹⁰⁵ *R v Bird* 2008 AJ 609 at para 6 [Bird].

¹⁰⁶ *R v Smith* 2009 NSJ 30 183 CRR (2d) 82 at para 28 [Smith].

The Manitoba Court of Appeal in *R v McClements* adopted the Ontario Court of Appeal's definition of accountability stating "For the purposes of the analysis under section 72(1)(b), accountability is the equivalent of the adult sentencing [objective of] retribution. See [also] *ZTS* at para 65 adopting the Ontario Court of Appeal's definition in *O (A)* at paras 47-50".¹⁰⁷

In *R v RDF*, a Saskatchewan Court of Appeal decision, in considering the objective of accountability in section 72(1)(b) referenced the Ontario Court of Appeal (*R v AO*) and stated "In *O.(A.)* at para. 46, this court identified accountability in the *YCJA* context as the equivalent to the adult sentencing principle of retribution, and further, recognized the close correlation between moral culpability and retribution."¹⁰⁸

In summary, prior to 2012 Supreme Court of Canada in *R v BWP* reasoned that deterrence (specific and general) and denunciation are not guiding principles under the *YCJA*, even within the notion of accountability. Accountability reasoned by the Ontario Court of Appeal in *R v AO* is equated to retribution. Retribution in the context of societal values is "conceptually distinguished from its legitimate sibling, denunciation,"¹⁰⁹ and any notion of deterrence, thereby endorsing the "offender-centric" nature of accountability as reasoned by the Supreme Court of Canada. The courts before and after the 2012 amendments have continued to look to *R v AO* and to a lesser extent *R v BWP* as authoritative guidance when considering the meaning of accountability under section 72(1)(b).

In the following chapter, I will restate the research questions and discuss the methods used to address the research questions posed in this study. I will also explain my data collection, sampling, and data analyses.

¹⁰⁷ *R v McClements* 2017 MJ No 314 at para 45; *R v McClements* 2017 MBCA 104 2017 CarswellMan 534 [McClements].

¹⁰⁸ *RDF supra* note 60 at para 83.

¹⁰⁹ *Ibid* at para 42.

Chapter 5

5 Methodology

As shown in the previous chapters, the combined effect of section 72, 3, and 38 of the YCJA identifies accountability as the purpose that youth court justices must consider when deciding an application to impose an adult sentence on a young person. Under the framework of section 72 (1)(b), the core determinant of whether a youth sentence is sufficiently long enough is accountability. The courts both before and after the 2012 amendments continue to rely on the Ontario Court of Appeal, *R v AO*, as the authoritative guidance when considering the meaning of accountability under section 72(1)(b).

This study seeks to examine how youth court justices across Canada have interpreted and applied the meaning of accountability within the amended section 72(1)(b). To answer this question, this study examines judicial decisions, post the 2012 amendments, to examine what drives accountability under section 72(1)(b). Is accountability being equated to retribution as suggested by the Ontario Court of Appeal in *R v AO*? Additionally, what effect has the introduction of specific deterrence and denunciation, under section 38(2)(f) had on the accountability inquiry under section 72(1)(b)?

For the current study, I have focussed on youth court decisions considered under section 72 of the YCJA, post the 2012 amendments. For this research I engaged in a qualitative analysis of sentencing decisions, post the 2012 amendments. This approach allowed for a more enriched understanding of the underlying themes that emerged during the case analysis. The research sample for this study was comprised of youth court decisions, dealing with section 72 and reported between the years 2012 and 2021. This purposeful sample was accessed by conducting a search using Quicklaw, an electronic legal database.¹¹⁰

¹¹⁰ LexisNexis (2016), Quicklaw.

5.1 Data Collection, Analysis and Coding

The sample was chosen using established criteria (the search words were specific to the language used in section 72(1)(b) within the period 2012-2021). Within Quicklaw, I ran a “basic search”, using the phrase from section 72(1)(b) “would not be of sufficient length to hold the young person accountable for his or her offending behaviour”. The search was designed to find all reported judgements decided after October 1, 2012 to December 31, 2021 the cut-off date for inclusion in this study. The search yielded 63 cases which I reviewed, coded, analyzed, and categorized using inductive content analysis.

First, I reviewed each case to determine its eligibility for inclusion in this study. Any cases that did not deal with section 72 of the YCJA, post the 2012 amendments, were excluded¹¹¹ from the sample. The final sample included 55 decisions. Once I determined their inclusion in the sample, I separated the decisions into two categories. The first set of cases were those in which the Crown failed to rebut the presumption under section 72(1)(a). The second set of cases were those in which the Crown rebutted the presumption under section 72(1)(a). In 25 (45.5%) of the 55 decisions, the Crown did not rebut the presumption under section 72(1)(a). These cases were put aside as it is only when the Crown rebuts the presumption of diminished moral blameworthiness or culpability that the courts conduct an accountability inquiry under section 72(1)(b).

In 30 (54.5%) of the 55 decisions the Crown rebutted the presumption under section 72(1). Under section 72, the Crown must satisfy both parts of the test (the “presumption prong” and the “accountability prong”). Accountability is assessed in the second part (accountability prong) of the test, in section 72(1)(b). Thus, it is the 30 decisions wherein the Crown rebutted the presumption under section 72(1)(a) that are the focus of this study.

¹¹¹ The cases that were excluded consisted of decisions dealing with offences that occurred prior to the 2012 amendments or dealt with unrelated matters, such as appeals as to the courts discretion on how much credit should be given for presentence custody or requests for time extensions on appeals.

I identified and coded key demographic characteristics, such as age, gender, whether the young person was a first-time offender or repeat offender, whether Gladue factors were considered, whether the presumption of moral blameworthiness under section 72(1)(a) had been rebutted, whether a youth or adult sentence had been imposed, geographical location, and the assessed level of risk for reoffending. I subsequently inputted the data into the SPSS software program to calculate the descriptive statistics.

For the qualitative component of the analysis, I immersed myself in the cases, focussing the analysis specifically on the 30 decisions wherein the Crown rebutted the presumption under section 72(1)(a). The qualitative analysis allowed me to examine the co-occurrence or “grouping” of the courts’ considerations when assessing whether a youth sentence would be of sufficient length to hold the young person accountable. Such an analysis revealed how these considerations often do not happen as separate occurrences but as combined considerations.

Consistent with inductive content analysis I examined sentencing rationales and outcomes, paying particular attention to the court’s interpretation and application of accountability under section 72(1)(b). Open coding was utilized to explore what interpretations and discourses were used by the courts when considering whether a youth sentence would be of sufficient length to hold the young person accountable for their offending behaviour.¹¹² This analysis allowed for the emergence of specific themes by examining word usage, phrasing, and key concepts. As the cases were read through, a number of notes and headings were made in the text. I kept a codebook outlining the descriptive statistics and emerging themes for each of the cases. I inputted the cases into the Dedoose software program and an Excel spreadsheet. Using both programs I was able to identify and record emerging themes such as whether accountability was equated to retribution, as reasoned by *R v AO*? How did rehabilitation factor into the court’s interpretation and application of the meaning of accountability? Did the courts refer to deterrence and denunciation when considering accountability under section 72(1)(b)?

¹¹² Klaus Krippendorff, *Content Analysis: An Introduction to its Methodology* (London: Sage Publications, 2012).

As is the case with content analyses, some categories in the coding scheme were straightforward and I could easily identify themes based on the manifest content. For example, in some instances explicit references were made to specific deterrence and denunciation in the accountability inquiry. Other themes were harder to identify because they were based on the latent content of the texts. For instance, public safety was synonymous to a young person's rehabilitative prospects and risk to reoffend. The coding process was iterative and revealed three sets of cases, which will be discussed in Chapter 6.

Chapter 6

6 Results

6.1 Demographic Descriptors

The sample, for this study, was comprised of 55 judicial decisions relating to section 72 of the YCJA, post the 2012 amendments. The decisions examined covered the time frame between 2012 and 2021. Of the 55 offenders, 52 (94.5%) are male and 3 (5.5%) are female. This gender breakdown is not surprising given that research has shown that males are arrested, charged, and convicted of more offences than females.¹¹³ Of the three females included in this sample of cases, the Crown failed to rebut the presumption of diminished moral blameworthiness under section 72(1)(a) in two (*R v SRM*¹¹⁴ and *R v JFR*¹¹⁵) of the decisions and therefore, the courts did not consider accountability under section 72(1)(b). In the third decision, *R v Henderson*, the Crown rebutted the presumption under section 72(1)(a) and the court determined that a youth sentence would not be of sufficient length to hold Henderson accountable. This decision will be discussed in more detail later in this chapter.

The modal age of the sample is 17 (49.1%) years old, followed by 16 (29.1%), 15 (18.2%), and 14 (3.6%), which was not surprising given the age-crime curve¹¹⁶ reveals that crimes are most prevalent during mid to late adolescence.¹¹⁷ These results are also consistent with Canada's police-reported data which have shown that crime rates tend to

¹¹³ National Crime Prevention Center, *A Statistical Snapshot of Youth at Risk and Youth Offending in Canada* (2018) online: <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ststclsnpshst-yth/index-en.aspx#sec02>.

¹¹⁴ *R v SRM* 2018 MJ 151 2018 MBQB 86.

¹¹⁵ *R v JFR* 2016 AJ 1142.

¹¹⁶ The age crime curve is the assumption that the prevalence of crime peaks during mid to late adolescence (see Travis Hirschi & Michael Gottfredson, "Age and the Explanation of Crime" (1983) 89:3 *The American J of Sociology* 552; Michael R Gottfredson and Travis Hirschi, *A General Theory of Crime* (Stanford: Stanford University Press, 1990).

¹¹⁷ *Ibid.*

peak during late adolescence and early adulthood.¹¹⁸ These results are also consistent with Canadian court data, which illustrate a similar trend. For example, in 2013/2014 young offenders aged 16 and 17 made up the largest proportion of accused persons in youth court, representing 62% of cases completed in youth court whereas youth 12 to 15 years old comprised 38%.¹¹⁹

Of the 55 young persons, 25 (45.5%) were first-time offenders and 27 (49.1%) were repeat offenders. There were 3 (5.5%) cases whose offence history was unknown. Of the 55 young persons, the court considered *Gladue* factors in 23 (41.2%) of the decisions. In 32 (58.1%) *Gladue* factors were not considered.

In terms of geographical location, of the 55 young persons, 15 (27.3%) of the decisions were from Manitoba, of which 8 (53.3%) received an adult sentence. Fourteen (25.5%) decisions were in Ontario, of which 6 (42.0%) received an adult sentence. There were 9 (16.4%) decisions in British Columbia, of which 4 (44.4%) received an adult sentence. Seven (12.7%) decisions were in Saskatchewan, of which 5 (71.4%) received an adult sentence and 4 (7.3%) decisions were in Alberta, of which 2 (50%) received an adult sentence. There was 1 (1.8%) decision in North West Territories, 1 (1.8%) in Quebec, 1 (1.8%) in Nunavut, 1 (1.8%) in Nova Scotia, 1 (1.8%) in Prince Edward Island, and 1 (1.8%) in Yukon. In Nunavut and the North West Territories, each young person received an adult sentence.

Of the 55 young persons in this sample of cases, the Crown did not rebut the presumption in section 72(1)(a) in 25 (45.5%) cases; thus, the “accountability prong” under section 72(1)(b) was not considered. These decisions were excluded from the qualitative analysis for two reasons: 1) the courts did not consider accountability inquiry under section 72(1)(b), or 2) any reference to accountability was obiter dicta. Of the 55 decisions in this

¹¹⁸ Statistics Canada, *Youth Court Statistics in Canada, 2010/2011*, by Shannon Brennan, (2012) online: <http://statcan.gc.ca/pub/85-002-x/2012001/article/11645-eng.htm>; Statistics Canada, *Youth Court Statistics in Canada, 2013/2014*, by Sarah Alam, (2015) online: <http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14224-eng.htm> at page 6 [Alam]

¹¹⁹ *Ibid* 6.

sample, in 30 (54.5%) the Crown rebutted the presumption under section 72 (1)(a) and therefore, section 72(1)(b), the “accountability prong”, was considered. In 27 (90%) of the 30 decisions that the court considered the accountability prong, the courts determined that a youth sentence would not be of sufficient length to hold the young person accountable for their offending behaviour. In three (10%) of the 30 cases, the court reasoned that a youth sentence would be sufficient length to hold the young person accountable for their offending behaviour. It is these 30 decisions where the court considered the accountability prong that is the focus of this qualitative analysis. The qualitative results will be discussed in the following section of this chapter.

6.2 Qualitative Results: Interpretation and Application of the Meaning of Accountability Under Section 72

This study examined how youth court justices across Canada have interpreted and applied the meaning of accountability within the amended section 72(1)(b). To answer this question, I examined judicial decisions post the 2012 amendments, to examine what drives accountability. Is accountability equated to retribution as suggested by the Ontario Court of Appeal in *R v AO*? Additionally, has the introduction of specific deterrence and denunciation, under section 38(2)(f), had an effect on section 72(1)(b)?

The qualitative results revealed three sets of cases. In all three groups weight was given to retribution, as reasoned by the Ontario Court of Appeal in *R v AO*, in the accountability analysis under section 72(1)(b). However, between and within the three groups the weight given to retribution differed. The first group of cases included 8 (26.7%) of the 30 decisions. In this group of cases, the courts reasoned that greater weight should be placed on retribution in the accountability analysis. Less weight was given to the rehabilitative needs of the young person. The added sentencing principles, specific deterrence and denunciation under section 38(2)(f) were not explicitly referenced in the accountability analysis.

The second set of cases included 16 (53.3%) of the 30 cases. In this group of cases the courts reasoned that weight also must be given to public safety. This is not to say that retribution and other factors were not a consideration. Rather, public safety was the

influencing factor in the accountability inquiry. Public safety was synonymous with the courts' assessments of the young persons' rehabilitative prospects and risk to reoffend. Further, in this set of cases rehabilitative needs played an equal or greater importance to retribution. In this set of cases there are references to public interest. There was no explicit definition of public interest within the cases. Through my examination of the cases that referenced public interest, I concluded that public interest is synonymous with the society's view regarding whether the sentence is an appropriate punishment. In the second set of cases, specific deterrence and denunciation were not explicitly referenced. Similar to the first set of cases, the added sentencing principles specific deterrence and denunciation under section 38(2)(f) were not explicit considerations in the accountability analysis.

The third set of cases included six (20%) decisions. In this set of cases, the courts reasoned that weight must also be given to specific deterrence and denunciation in the accountability analysis. This is not to say that retribution and public safety did not play a role, rather, the courts explicitly referenced specific deterrence and denunciation when engaging in the accountability inquiry. In this set of cases, unlike the first and second group of cases, the introduction of specific deterrence and denunciation, under section 38(2)(f), influenced the accountability analysis.

6.3 Case Summaries

In the next section of the chapter, I present 23 case summaries¹²⁰ to illustrate the three groups, paying particular attention to the discourse provided by the judges when engaging in the accountability inquiry. I chose these decisions to focus on as they provide the necessary information to give the reader a detailed, meaningful and representative illustration of the research findings. It should be noted that the three sets of cases are not mutually exclusive.

¹²⁰ Summaries of the remaining seven decisions are included in the footnotes.

6.3.1 Group 1: Retribution and the Accountability Inquiry

In the following 8 (26.7%) decisions, the courts reasoned that greater weight should be placed on retribution in the accountability analysis. Accountability in this set of cases is equated to the adult sentencing principle of retribution as reasoned by the Ontario Court of Appeal in *R v AO*. To hold a young person accountable, the severity of the offender's sentence should reflect the moral culpability of the offender having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct.¹²¹ Little to no weight was given to rehabilitation and risk to reoffend; therefore, in this set of cases, the rehabilitative needs of the offenders and assessments of lower risk to reoffend were given less weight to retribution. Specific deterrence and denunciation were not explicitly referenced. As such the added sentencing principles, specific deterrence and denunciation under section 38(2)(f) were not explicit considerations in the accountability analysis.

In the following decision, rehabilitation held minimal weight in the accountability inquiry. In the Manitoba Court of Appeal decision *R v McClements*, McClements pled guilty to second degree murder and was sentenced as an adult.¹²² This decision stands out as the Manitoba Court of Appeal overturned the trial court's decision, which had emphasized McClements' rehabilitative progress. The trial court was of the view that McClements' rehabilitation was well underway and he posed no real risk to public safety.¹²³ However, the Manitoba Court of Appeal, stated "It [youth sentence imposed by the trial court] was simply not long enough to reflect the seriousness of the offence and the respondent's role in it".¹²⁴ The Appeal Court acknowledged McClements' positive rehabilitative progress and low risk to reoffend; however, the rehabilitative needs of

¹²¹ *AO supra* note 6 at para 42.

¹²² *McClements supra* note 104.

¹²³ *R v AM* 2016 MJ No 260 2016 MBQB 161 at para 31 [AM].

¹²⁴ *Supra* note 107 at para 71.

McClements had minimal weight when the court considered the “high moral culpability”, at the time of the offence, and the “random, violent and unexplained murder”.

As stated by the court:

The record shows that the respondent has made progress in his efforts of rehabilitation. However, *this progress to date does not address the need to hold him accountable* [emphasis added] for his offending behaviour by this random, violent and unexplained murder.”¹²⁵

The Appeal Court held:

There can be no question that the murder was an offence of high intentional risk taking that resulted in devastating consequential harm. The sentencing judge understood this, as evidenced by her description of the respondent’s moral culpability in the context of this high intentional risk taking or the normative character of this conduct for the purposes of the analysis required by section 72(1)(b). *To repeat, the respondent’s moral culpability is high, given his high intentional risk taking* [emphasis added] of associating with gang members, possession of semi-automatic weapons following the victim’s group and shooting the deceased in the back several times. Furthermore, *the normative character of the respondent’s criminal conduct is of such a random and violent nature that it shocks the conscience of the community* [emphasis added].¹²⁶

In the following two cases, rehabilitation was considered but was assigned secondary importance. In both cases, the offenders were adults at the time of sentencing. Both had committed the offences when they were teenagers but had avoided detection for close to three decades. In *R v Ellacott*, an Ontario Court of Appeal decision, the offender was 15 years old at the time of the offence. Ellacott had avoided detection for three decades; by

¹²⁵ *Ibid* at para. 74.

¹²⁶ *Ibid* at paras 66-68.

the time he was convicted he was middle-aged father and was employed. He had not been convicted of any further crimes, which suggested he had rehabilitated himself. The Ontario Court of Appeal dismissed the appeal stating:

In my view, the appellant was properly sentenced as an adult. Although the sentencing judge erred in using the appellant's testimony and denial of guilt as aggravating factors, the error is of no consequence and the sentence is nonetheless fit. The enormity of the appellant's crime renders a youth sentence manifestly inadequate to hold the appellant accountable.¹²⁷

Although the trial court, as stated by the Appeal Court,

considered that neither rehabilitation nor risk was a live issue, and that this weighed in favour of a youth sentence, this was subject to the caveat that the appellant's motive for committing the crime was not understood. The sentencing judge did not err in concluding that a proportionate sentence in this case emphasized accountability rather than rehabilitation and reintegration.¹²⁸

Similarly, *R v RDM*, an Ontario Superior Court of Justice decision involving a 46-year-old male who had been found guilty of sexual assault, while armed with a knife, robbery and threatening death, offences he had committed when he was 17-years old. RDM had accumulated an extensive criminal record, after the offence, which included crimes of violence, dishonesty, breaches of court order and drugs.¹²⁹

At the time of sentencing, RDM was in a committed relationship; living with his spouse and their child and was self-employed. The court recognized that RDM had reintegrated himself into society in stating "R.D.M. is 46 years of age and has arguably reintegrated into society, as demonstrated by his previous four year-long romantic relationship, his

¹²⁷ *R v Ellacott* 2017 OJ 4563 2017 ONCA 681 at para 8 [Ellacott].

¹²⁸ *Ibid* at para 38.

¹²⁹ *R v RDM* 2019 OJ 3174 2019 ONSC 3007 at para 15 [RDM].

current romantic relationship, and his current self-employment”.¹³⁰ The court held that “an assessment of accountability must factor in [the] aggravating circumstances [the sexual assaults at knifepoint, including threats and robbery, were egregious. The threats caused the victim to fear for her life]”.¹³¹ The court approached the accountability in a similar manner as *R v Ellacott*. This was illustrated when the court cited *R v Ellacott 2017 ONCA 681* at para. 36. The Ontario Superior Court of Justice wrote:

Potentially in favour of a youth sentence are the factors of rehabilitation and reintegration. R.D.M. is 46 years of age and has arguably reintegrated into society, as demonstrated by his previous four year-long romantic relationship, his current romantic relationship, and his current self-employment. However, even taking these factors at their best, *rehabilitation and reintegration are not determinative of the accountability inquiry* [emphasis added]: *R v Ellacott, 2017 ONCA 681*, at para. 36, citing *R. v O.(A.), 2007 ONCA 144, 84 O.R. (3d) 561*, at para. 57.¹³²

On appeal, the Ontario Court of Appeal dismissed the sentence appeal stating “Based on the circumstances of the offences and the offender, and mindful of the jurisprudence that I have just reviewed, I am not satisfied that the [adult] sentence is demonstrably unfit.”

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In *R v K.M.*, a Northwest Territories Supreme Court decision, the principle of restraint and public safety were assigned to a secondary importance to retribution. In considering the issue of accountability, the court did not overlook the positive things about K.M.’s background and the efforts that he had made to rehabilitate himself while on remand.¹³⁴ Furthermore, as stated by the court “In considering the issue of accountability, I have also

¹³⁰ *Ibid* at para 21.

¹³¹ *Ibid* at para 21 and 22.

¹³² *Ibid* at para 21.

¹³³ *R v RM* 2020 OJ 1299 ONCA 231 15 OR (3d) 39 at para 45 [RM].

¹³⁴ *R v KM* 2017 NWTJ 27 2017 NWTSC 26 at para 187 [KM].

not overlooked the principle of restraint, and its particular significance in sentencing a youth aboriginal offender”.¹³⁵ However, “the principle of restraint, as important as it is, cannot be paramount in deciding this Application”.¹³⁶ As stated by the court:

K.M.’s crime was the most serious known to our law [“this murder was particularly horrific, senseless, and brutal”¹³⁷]. His victim was a relative, an aboriginal woman from their aboriginal community. The crime had a profound impact on that community. The principles articulated in the Supreme Court of Canada in *Gladue* and *Ipeelee*, important as they are do not reduce K.M.’s blameworthiness to the point that a youth sentence can adequately address the need to hold him accountable for his actions.¹³⁸

It was also the Northwest Territories Supreme Court’s view that rehabilitation play played a secondary role¹³⁹ to retribution in the accountability inquiry.¹⁴⁰ As stated by the court:

¹³⁵ *Ibid* at para 191

¹³⁶ *Ibid* at para 193

¹³⁷ *Ibid* at para 180

¹³⁸ *Ibid* at para 193.

¹³⁹ In *R v DD*, 2016 MJ 136 130 WCB (2d) 570 [DD] the Manitoba Provincial Court held “The serious nature of the offences, committed by an armed accused against vulnerable retail outlets [described by the court as falling within the definition of a “spree” fueled by addiction to drugs and alcohol], requires a disposition longer than the three years available under a youth regime. I am satisfied that given the facts of these offences and the circumstances of this offender, a youth sentence would be insufficient to hold this accused accountable even taking into account the year he has already spent in custody” and “recent reports [that] suggest some improvement in his attitude and behaviour” (at para 36-37). In this case, the court considered DD’s rehabilitative progress; however, it was assigned to secondary importance to retribution.

¹⁴⁰ *R v TBK* 2019 BCJ 1184 [TBK] is a British Columbia Supreme Court. In assessing accountability in section 72(1)(b), rehabilitation was of secondary importance to retribution. The British Columbia Supreme Court stated “I consider, as I said I would and as I did also under the question of moral responsibility, the circumstances of the case. He shot two people in close range. He travelled there to do it on both occasions. They were both planned. He intended to kill them. These were attempted assassinations. He did not appear to express any emotion. It was cold and calculated. It is a matter of happenstance that we are not dealing with two first degree murder charges. I also consider that he was still carrying the gun three weeks later, loaded. I agree with Mr. Wright that that has pro and con elements to it in terms of us trying to determine what is going on in this young man’s mind. His behaviour, both before and after, seemed unaffected by what he was planning and what he had done, and I also consider, that one of the shootings, as I have

Even if I had concluded that a youth sentence would be sufficient to foster K.M.'s rehabilitation and provide reasonable assurances that he can be safely reintegrated into the community, I would nonetheless have imposed an adult sentence in this case because I am profoundly convinced that a youth sentence would not reflect the seriousness of his crime. I am persuaded that such a sentence would not, fundamentally, be just.¹⁴¹

In summary, in the first set of cases retribution was the driving force in the accountability inquiry. Even when the prospects for rehabilitation were positive and the offender was at a lower risk to reoffend, rehabilitative needs were secondary or no importance to the accountability analysis. The first group of cases differs from the second set of cases

already indicated, was an attack on our administration of justice in that the motive was an attempt to cause a witness to decide not to testify against his friend" (at paras 53-55). The court in considering TBK's placement stated: "As far as his placement, there is always some danger of placing young individuals with older seasoned criminals in a jail setting. However, in [the accused]'s case, he already has been exposed to those individuals and has done various serious offences in their company which makes me conclude that placing him in the adult system will not cause him much distress or be that detrimental to him (at para 63). Thus, TBK's rehabilitative needs were of secondary importance to retribution.

In *R v IKG* 2017 OJ 864 [IKG] the court held "I am also of the opinion pursuant to the provisions of section 72(1)(b) of the *Youth Criminal Justice Act* and on the basis of the concession by the defence, that his moral culpability here is significant and the presumptions that normally relate to young offenders and their responsibilities simply do not apply in the circumstances here" (at para 10). The court recognized IKG's rehabilitative progress and stated, "It would appear from the report that by and large [IKG] has made some significant gains while in the youth system" (at para 26). The court also considered the threat to IKG's continued rehabilitative progress once transferred into an adult facility in stating "A federal penitentiary for a young man of this age is not a pleasant experience. I am hopeful that he has equipped himself sufficiently over the past year at the youth facility that he is able to have the wherewithal and the fortitude to carry on with the improvements that he has made and that he will continue with the counselling that he has undertaken, continue to gain insight into his behaviour and continue to seek to improve his behaviour while he is in custody" (at para. 27). Thus, rehabilitation was assigned to a secondary role to retribution in that the court recognized the threat to IKG's rehabilitative progress once transferred into an adult facility; however, that held less weight to his significant moral culpability.

In *R v TG* 2019 OJ 2684 2019 ONSC 3057[TG], the Ontario Superior Court of Justice stated: "I cannot fashion an appropriate sentence based solely on rehabilitation without regard to proportionality and accountability. The sentence available under the *YCJA* is simply inadequate to accomplish those objectives. While the court stated "In sentencing T.G. as an adult, I do not abandon the principle of rehabilitation. [Rather,] If I sentenced him as a youth, I would have to abandon proportionality and accountability" (at para 78). Thus, rehabilitation was assigned a secondary role to retribution.

¹⁴¹ *KM supra* note 131 at para 179.

because in the second set of cases the rehabilitative needs, which was synonymous with public safety, was viewed as having equal to or of greater weight to retribution.

6.3.2 Group 2: Public Safety and the Accountability Inquiry

The second set of cases included 16 (53.3%) of the 30 cases. In the second group of cases the courts reasoned that weight must also be given to public safety. Retribution, in this set of cases, was of equal weight to public safety or was assigned to a less important consideration to public safety. This is not to say that retribution and other factors were not a consideration. Rather, public safety influenced the accountability inquiry within this discussion. Public safety reflected the courts assessment of the young persons' rehabilitative progress and risk to re-offend as such rehabilitation and public safety will be used interchangeably throughout this study. In the second set of cases, specific deterrence and denunciation were not explicitly referenced. Thus, the added sentencing principles specific deterrence and denunciation under section 38(2)(f) were not explicit considerations in the accountability analysis.

I will begin by discussing two decisions where the courts were specifically asked to consider whether the “protection of society” is included within the accountability analysis. In both these instances, the courts held that protection of the public is a part of the accountability inquiry. In both cases, public safety and retribution were of equal weight in the accountability analysis.

In the Alberta Court of Appeal decision, *R v AWB*, the Appeal Court was specifically asked to consider, among other points, whether the “protection of the public” is included within the accountability analysis. AWB appealed the sentence arguing that “the sentencing judge misapprehended the evidence regarding the ease with which the appellant could be rehabilitated and placed too much emphasis on the protection of the public.”¹⁴² The Appeal court dismissed the appeal and held that:

¹⁴² *R v AWB* ABCA 159 146 WCB (2d) 488 at para 37; *R v AWB* 2019 SCC 129 2019 CSC No 129. [AWB]

Consideration of the protection of the public is part of the accountability analysis. A youth sentence must be long enough to provide a reasonable assurance of the offender's rehabilitation to the point where he can be safely integrated into society: *R v E(D)*, 2010 ABCA 69 at para 14, 474 AR 360. The sentencing judge was entitled to take this into account. It is clear from a review of the entire reasons that there was *no overemphasis on this one factor* [emphasis added].¹⁴³

The Supreme Court of Canada, in 2019, dismissed AWB's application for leave to appeal.¹⁴⁴

In the British Columbia Supreme Court decision, *R v Choi*, the court explicitly considered public safety when assessing Choi's rehabilitative prospects and risk to reoffend. Rehabilitative prospects and assessments of risk to reoffend, according to the court, are predictions of future conduct (threat to public safety) and as such are "undoubtedly relevant" to the accountability inquiry. As stated by the British Columbia Court of Appeal:

Significant progress and growth can be indicative of immaturity at the time of the offence... However, *in my view, future rehabilitation prospects or risk to reoffend cannot be indicative of moral blameworthiness at the time of the offence, since they are predictions of future conduct. They are undoubtedly relevant to s. 72(1)(b)* [emphasis added]. I am not convinced they are a relevant consideration for s. 72(1)(a)."¹⁴⁵

The court considered Choi's history in custody and reasoned that "the prospects for rehabilitation within the short- or medium-term future are very dim indeed".¹⁴⁶ The court held that a youth sentence would not be of sufficient length to hold Choi accountable for

¹⁴³ *Ibid* at para. 50.

¹⁴⁴ *Ibid*.

¹⁴⁵ Choi *supra* note 84 at para 54.

¹⁴⁶ *Ibid* at para 130.

his conduct. Such a sentence “would not be long enough to reasonably ensure that Mr. Choi will be successfully rehabilitated and re-integrated into a law-abiding life”.¹⁴⁷ The British Columbia Court of Appeal dismissed the appeal.

In the following case, the court also gave equal weight to public safety and to retribution. In *R v ASD*, a British Columbia Supreme Court decision, ASD and GCAR¹⁴⁸ were convicted of manslaughter. LZ was convicted of second-degree murder, all in connection with the stabbing death of LG.¹⁴⁹ The British Columbia Supreme Court held LZ possessed the maturity, moral sophistication, and capacity for independent judgment of an adult under the presumption prong.¹⁵⁰ In assessing accountability, the court reasoned that “Proper accountability requires a more substantial sentence than the YCJA can provide”.¹⁵¹ As stated by the British Columbia Supreme Court:

It was dangerous conduct that reflected a very high degree of intentional risk-taking, resulting in the maximum possible harm that one human being can inflict on another, and represented overall quite a pronounced and chilling rejection of the normative standards of behaviour in society.¹⁵²

The British Columbia Supreme Court recognized LZ’s “reformed attitude” stating:

On the question of rehabilitation, I do not question Mr. Z.’s sincerity about pursuing changes in his life. However, Dr. Bartel, the most careful of the experts, described Mr. Z. as only “possibly” a much lower risk than previously, noted the role that house arrest has played in the process, and conceded that it cannot be

¹⁴⁷ *Ibid* at para 132.

¹⁴⁸ The court was not satisfied that ASD and GCAR possessed the level of maturity, moral sophistication and capacity for independent judgment of an adult and, therefore, the Crown failed to rebut the presumption under section 72(1)(a).

¹⁴⁹ *R v ASD* 2019 BCJ 162 2019 BCSC 147 headnote [ASD].

¹⁵⁰ *Ibid* at para 572.

¹⁵¹ *Ibid* at para 584

¹⁵² *Ibid* at para 584.

determined whether any of these changes “are sustainable in the long term”. Although Dr. Stevenson wrote more confidently about Mr. Z.’s prospects, he too accepted that it is impossible to predict whether the positive changes will ensure or to predict what his performance in the community will be on something less restrictive than house arrest. Only Dr. Ley was prepared to assert more generally that the structure of a youth sentence will meet Mr. Z.’s rehabilitation needs.¹⁵³

However, based on LZ’s post offence behaviour, his full rehabilitation would not be achieved within the time frame of a youth sentence. Prior to the electronic monitoring bracelet being imposed, LZ was breaching his curfew at will, orchestrating his parents’ cooperation, continuing to see his criminal associates and continuing to receive some of the proceeds of his former drug operation.¹⁵⁴ “It is no coincidence that all of the experts, even Dr. Ley who expresses greater confidence in Mr. Z.’s rehabilitation prospects, mention the need for intensive monitoring and swift responses to any non-compliance during the community portion of his sentence”.¹⁵⁵ As stated by the court:

To be clear, I am not denigrating Mr. Z.’s reformed attitude, which does him great credit, nor the potential benefits of intensive resources to his eventual rehabilitation. I just have no confidence on the available evidence that his rehabilitation and reintegration into society in any reasonable manner with regard to risk [LZ was deemed to be a high-risk to reoffend violently at the time of the offence] can be accomplished within the parameters of a youth sentence¹⁵⁶

¹⁵³ *Ibid* at para 585.

¹⁵⁴ *Ibid* at para 587.

¹⁵⁵ *Ibid* at para 587.

¹⁵⁶ *Ibid* at para 591.

As further stated: “I think what the period between his breach and the writing of the reports really shows is that he functions well in the electronic equivalent to imprisonment.”¹⁵⁷

Equal weight was also given to public safety and retribution in *R v Green*, a Manitoba Court of Queen’s Bench decision, Justice Toews directly referenced public safety. As stated by the court:

In this case, Mr. Green’s moral blameworthiness is high and his criminal record as a youth is egregious, particularly when one considers his response to court orders and the attempt of youth corrections personnel to assist him in rehabilitation. *His response to the extensive assistance and programming which he had access to, is appalling and a significant concern to public safety* [emphasis added], especially in view of the fact that he committed two separate murders within two days, only a few months short of his 18th birthday.¹⁵⁸

This theme (equal weight given to public safety and retribution) appeared in other decisions.¹⁵⁹ For instance, in *R v Okemow*,¹⁶⁰ a Manitoba Court of Appeal decision,

¹⁵⁷ *Ibid* at para 587.

¹⁵⁸ *R v Green* 2017 MJ 328 at para 32 [Green].

¹⁵⁹ In *R v Joseph* 2016 OJ 2450 2016 ONSC 3061 [Joseph], the Ontario Superior Court of Justice, in assessing accountability relied on a number of factors, including the serious nature of the offence, the principal role played by PJ, the fact that Joseph had not accepted responsibility for his offending behaviour, along with his uncertain prognosis (his conduct in custody) since the offence was “mixed or uneven” (at para 56). “On the one hand, he deserves significant credit for completing high school with good marks, for completing a number of additional programs, and for impressing some of the staff on some occasions. On the other hand, he has not yet agreed to or carried out the recommended treatment with anti-depressant medication. In addition, his overall behavioural performance at RMYC was middling and some of his “misconducts” raise real concerns (in particular, he apparently fashioned a weapon, he secreted sandpaper from the workshop on his person, and he refused to account for this conduct). When these aspects of P.J.’s behaviour at RMYC are combined with his ongoing unwillingness to acknowledge and address the facts of the present offence, for example, by explaining the alarming “stellate” cut beside Cocomello’s eye and nose, there remain real concerns about P.J.’s present values and about his present behaviour” (at para 56). The Ontario Superior Court of Justice held a youth sentence would not be of sufficient length to hold PJ accountable (at para 57). Further a youth sentence would not “be an appropriate sentence either for the protection of the public or for P.J.’s rehabilitation and reintegration into society” (at para 63). While on the surface the court seems to distinguish rehabilitation from public safety. The court reasoned that a youth sentence would not be of sufficient length for Joseph’s rehabilitation and reintegration and consequently would pose a risk to public safety. Thus, if a young person shows less favourable prospects for

Okemow pleaded guilty to fourteen offences that had occurred when he was 14-years-old the most serious being two armed robberies.¹⁶¹ Okemow had made limited progress during his post-offence custody. The Appeal Court stated:

The judge’s reasons show that, on the question of proportionality, she was concerned about the *serious nature of the offences and the young person’s high moral blameworthiness* [emphasis added]. On the question of rehabilitation, she [trial judge] was concerned that his [Okemow’s] aggressive personality, other risk factors and lack of progress despite a lengthy period of presentence custody made his prospects for rehabilitation and reintegration into the community dim. Taking these considerations together, she concluded that *protection of the public could not be achieved by a youth sentence* [emphasis added].¹⁶²

The court further stated: “The risk to public safety in this case is acute and there is no plan whatsoever to manage the risk the young person presents”.¹⁶³ It was the perceived

rehabilitation and poses a higher risk of reoffending, they will pose more of a threat to public safety. (See also *R v Joseph* 2020 ONCA 73 60 CR (7th) 322).

This theme is found in *R v Prockner* 2018 SJ 269 2018 SKCA 52 [Prockner], the Saskatchewan Court of Appeal. The court dismissed the appeal reasoning that “even if an IRCS sentence under s. 42(2)(r) of the *YCJA* was an option, it would not hold Mr. Prockner accountable for his offending behaviour” (at para. 88). In referencing the trial court, Saskatchewan Court of Queens’ Bench, stated “Turning to the issue of whether a youth sentence would be sufficient to hold Mr. Prockner accountable for his offence, the sentencing judge noted both the seriousness of the offence to which he had pled guilty and his lead role in its commission. She also noted that the evidence relating to Mr. Prockner’s commitment to change was mixed and she expressed concern over what she saw as Mr. Prockner’s apparent reluctance or inability to demonstrate remorse for his actions. In this regard, she accepted Dr. Harold’s testimony that Mr. Prockner suffers from deficits in empathy and remorse. She accepted what she saw as the consensus of the professionals who, save Dr. Nicholaichuk, had testified to the effect that Mr. Prockner’s prognosis for a successful, safe and speedy reintegration into society was at best guarded. By way of bottom line, the sentencing judge concluded that a youth sentence would not be sufficient to hold Mr. Prockner accountable for his offending behaviour” (at para. 60).

¹⁶⁰ Okemow *supra* note 82 at para 67.

¹⁶¹ *Ibid* at para 1

¹⁶² *Ibid* at para 92.

¹⁶³ *Ibid* at para 127.

“aggressive personality”¹⁶⁴ of Okemow and his poor prospects for rehabilitation that posed a threat to public safety.

In *R v LTN*,¹⁶⁵ the Saskatchewan Court of Queen’s Bench reasoned that weight also must be given to public safety and public interest in the accountability inquiry. As stated by the court:

For an offender to be accountable, a sentence must consider the public safety and the public interest. Here there was a significant level of violence displayed in the four shootings and the wounding of the two people from a distance. This, coupled with his aggressive behaviour, and self-harm issues, and the subsequent violence of the armed robbery convictions, suggest that significant issues need to be addressed before he can safely be returned to the community.¹⁶⁶

Public safety and public interests were also given equal weight to retribution in *R v RDF*,¹⁶⁷ a Saskatchewan Provincial Court decision. RDF pled guilty to two counts of first-degree murder, two counts of second-degree murder, and seven counts of attempted murder. The trial court considered the seriousness of the offenses and public interest¹⁶⁸

¹⁶⁴ Aggressive personality concerns were also seen in *In R v MJM* 2016 MJ No 81. The Manitoba Court of Queen’s Bench described MJM as “a very dangerous person who continued to behave in an aggressive and confrontational manner after being incarcerated and convicted” (at headnote). While MJM had taken steps towards his rehabilitation, the Manitoba Court of Queen’s Bench viewed the changes as “a manipulative tactic in the hope that I [the court] will find that he should not be sentenced as an adult” (at para. 85).

¹⁶⁵ *R v LTN* 2019 SJ 535 2019 SKQB 337 [LTN]

¹⁶⁶ *Ibid* at para 75.

¹⁶⁷ Rehabilitation was given equal importance to public safety, interests of society, and retribution in *R v JMF* 2020 MH 294 2020 MBQB 161. The Manitoba Court of Queen’s Bench was not satisfied that a youth sentence would be of sufficient length to hold J.M.F. accountable for the first-degree murder conviction (at para. 39). The court “[accepted] J.M.F. [had] made progress while in custody for which he should be justifiably proud” (at para 44). However, “an adult sentence reflects the seriousness of J.M.F.’s crime and J.M.F.’s role in it. It will provide reasonable assurance of J.M.F.’s rehabilitation to the point where he can safely be reintegrated into society. While my focus throughout must be on J.M.F., the interests of society remain important and, in my opinion, an adult sentence in this fact situation is consistent with those interests” (at para 40).

¹⁶⁸ RDF *supra* note 60.

when the court determined that a youth sentence would not be sufficiently long enough to hold the young person accountable. The trial court held that “For an offender to be accountable a sentence must consider the public safety and the public interest”.¹⁶⁹ RDF’s “level of violence and moral culpability [were] high. He ambushed and murdered both [victims]. The school shootings were planned and calculated to inflict the most damage and pain as possible”.¹⁷⁰ Further, there was uncertainty regarding RDF’s risk to reoffend, which the court reasoned “directly impacts public safety”¹⁷¹.

It was the view of the trial court that RDF “requires long term monitoring for his rehabilitation and to meet his ongoing needs, many of which are unknown at this time, as well as for his eventual safe reintegration back into the community”¹⁷². The court considered the rehabilitative needs of RDF, being that he required long term monitoring for his rehabilitation and ongoing needs. In other words, the court’s concern for public safety influenced the accountability inquiry. Further, that a youth sentence would not be reflective of the seriousness of RDF’s crimes. Thus, retribution was of equal importance to public safety and public interest.

As stated by the courts:

Even if I was convinced that a youth sentence would be sufficient to meet his rehabilitation needs and provide a basis for him to be safely reintegrated into the community, nevertheless, I would impose an adult sentence. In the case at bar, *a youth sentence would not reflect the seriousness of R.F.’s crimes nor would a youth sentence be a just sentence* [emphasis added].¹⁷³

¹⁶⁹ *Ibid* at para 319.

¹⁷⁰ *Ibid* at para 320.

¹⁷¹ *Ibid* at para 317.

¹⁷² *Ibid* at para 323.

¹⁷³ *Ibid* at para 323.

In the following cases, public safety was given greater weight to retribution. In a Saskatchewan Provincial Court decision, *R v WM*, accountability was equated to retribution when the court described the incident as “quite literally an orgy of violence and blood”¹⁷⁴. Greater weight was given to the risk posed by WM. In making the decision, the Saskatchewan Provincial Court drew upon the Supreme Court of Canada in *R v BWP* in which the court held that the “principles of accountability mandate an “offender-centric” approach that is not aimed at the general public and thus eliminates general deterrence as a principle of sentencing”.¹⁷⁵ The Saskatchewan Provincial Court held that the Supreme Court of Canada “did not exclude damage done to the community as a factor in sentencing” and therefore could be a factor in the consideration under section 72(1)(b).¹⁷⁶ As the Saskatchewan Provincial Court stated:

In my view, the extreme violence, the relatively sophisticated robbery plan and the kindness and friendship shown by Simon Grant [victim] to W.M. causes right-thinking members of society with all the relevant knowledge to demand a sentence that reflects their shock and horror relating to this incident. And in my view, a youth sentence will not and cannot achieve this. *More importantly, the risk posed by W.M. once he is out of custody cannot in my view, be safely managed with a youth sentence* [emphasis added]. Three years would be the maximum amount of time to help this young man deal with the ghosts of his past, overcome personality, psychological and psychiatric disorders and deal with what appeared to be serious additions problem. Dr. Quinn testified some of these issues can take five to ten years or even longer to correct. In my view, a youth sentence would also fail on this account – that is the critical components of rehabilitation and reintegration.¹⁷⁷

¹⁷⁴ *R v WM* 2019 SJ 309 at para 49.

¹⁷⁵ *Ibid* at para 53.

¹⁷⁶ *Ibid* at para 53.

¹⁷⁷ *Ibid* at para 54.

Further, in *R v DVJS*, a Manitoba Provincial Court decision, the court accepted the Ontario Court of Appeal's definition of accountability as excluding "accountability to society in any larger sense or any notion of [general] deterrence".¹⁷⁸ However, accountability did not exclude the protection of society. Rehabilitative needs and DVJS's conduct post-offence justified the need for extended state monitoring under the accountability inquiry. As the Manitoba Provincial Court stated:

In addition to those video and sound excerpts, there is expression of remorse that is hardly meaningful in Dr. Fisher's opinion if it reflects "ingrained criminalized aspects [The Pre-Sentence Report and the IRCS report stated he was at a very high risk to re-offend.] in his personality functioning and behavioural decision-making" at the time. And it is eclipsed by the evidence of D.V.J.S. excitedly leaving the scene of the murder, impressing friends with a rendition of how it happened, using the cell phones to make videos of each other and talking about how cool it is to kill someone. *I am left with a sketch of someone who is capable of feeling pride in the accomplishments of the robbery and the homicide. That is such a distance from accountability, within the meaning of the YCJA, that accountability is not even in sight [emphasis added].*¹⁷⁹

The Manitoba Provincial Court further stated, "I am not at all satisfied that just sanctions carrying meaningful consequences exist today or are likely to exist within the next seven years such that D.V.J.S. will be rehabilitated and reintegrated into society "thereby contributing to the long-term protection of the public"". ¹⁸⁰ The Saskatchewan Court of Appeal dismissed the appeal.¹⁸¹

¹⁷⁸ *R v DVJS* 2013 MJ No 172 107 WCB (2d) 221 at para 7 [DVJS].

¹⁷⁹ *Ibid* at para 48.

¹⁸⁰ *Ibid* at para 50.

¹⁸¹ RDF *supra* note 60.

In *R v Henderson*, a Saskatchewan Provincial Court decision, Henderson was charged with second degree murder. It should be noted that Henderson was the only female young person in this sample of cases wherein the court determined that a youth sentence would not be sufficiently long enough to hold her accountable for the offending behaviour. Similar to the previously discussed cases, the court considered the retributive aspect of accountability when engaging in the accountability prong. However, greater weight was placed on rehabilitation and the threat Henderson posed to public safety. The Saskatchewan Provincial Court stated:

Jacqueline brutally murdered one of the most vulnerable victims imaginable, an innocent and defenceless 46-day-old infant. Moreover, her reasons for doing so are still, largely, unfathomable. Perhaps most disturbing, as has been noted earlier, a number of professionals have concluded that Jacqueline is not really a treatment candidate. Consequently, her high risk to violent reoffend remains unabated, and even she has expressed concerns that she might commit a similar offence in the future.

As further stated by the Saskatchewan Provincial Court:

Given the seriousness of the offence and the degree of responsibility that Jacqueline bears for it, a youth sentence would not be proportional response. *Moreover, a youth sentence would not be long enough to provide reasonable assurance of Jacqueline's rehabilitation to the point where she can be safely reintegrated into society* [emphasis added].¹⁸²

Similar in *R v AG*¹⁸³ an Ontario Court of Justice decision, public safety was synonymous with rehabilitation. Greater weight was placed on rehabilitation to retribution. The court reasoned that “A.G.’s prospects of successful rehabilitation and safe reintegration into the community are enhanced by the comprehensive specialized treatment [Intensive

¹⁸² Henderson *supra* note 59 at paras 73 and 74.

¹⁸³ *R v AG* 2019 OJ 1815 2019 CarswellOnt 5489 [AG].

Rehabilitative Custody and Supervision] program”¹⁸⁴ As stated by the Ontario Court of Justice:

A youth sentence of three years Intensive Rehabilitative Custody and Supervision, apportioned as two and a half years or 30 months, in continuous custody followed by six months under conditional community supervision, is a significantly longer custodial sentence than the [adult] sentence the Crown is asking for.¹⁸⁵

The following Ontario Court of Justice decision, *R v MG*¹⁸⁶ is different than the previously discussed cases as greater weight was placed on the principle of restraint and public safety than to retribution. The Crown took the legal position that a young person who is assessed as being at a high risk to reoffend should be kept in custody or under supervision for as long as they pose a risk. The court held that this interpretation of accountability would be entirely at odds with the exercise of restraint. As the Ontario Court of Justice, in *R v MG*, held:

The Crown has urged that I adopt an interpretation of the accountability portion of the test to mean that a young offender at high risk to re-offend must be kept in custody or under supervision for as long as they pose a risk [MG was assessed as being a high risk to reoffend]. That interpretation would be entirely at odds with the principles of sentencing requiring the exercise of restraint in arriving at a just sentence. It would reduce the task of the judge to a simple consideration of how long the young person must be kept in custody or under community control to eliminate risk to the exclusion of the other factors set out in section 38 or the jurisprudence. It also presumes that accountability cannot be achieved through means other than long term incarceration or supervision.¹⁸⁷

¹⁸⁴ *Ibid* at para 84

¹⁸⁵ *Ibid* at para 85.

¹⁸⁶ *R v MG* 2017 OJ 4323 2017 ONCJ 565 [MG].

¹⁸⁷ *Ibid* at para 24.

Thus, the court was:

not satisfied that a youth sentence would not be of sufficient length to hold M.G. accountable for his actions. Accountability is not achieved by simply retaining state control over an offender for the maximum legally permissible time. It requires, rather, a consideration and balancing of all the principles of sentencing set out in section 3 and section 38 of the YCJA. *The best protection the public have against M.G. committing further racist or violent acts is the type of intensive counselling and support that has been put in place for him* [emphasis added].¹⁸⁸

6.3.3 Deterrence and Denunciation and the Effect on Accountability

The results of this study reveal that the addition of denunciation and deterrence in the amended section 38(2)(f) has had an effect on the courts' interpretation and application of accountability, under section 72(1)(b). In 6 (20%) of the 30 cases, we can see direct references to specific deterrence and denunciation in the accountability inquiry. This is not to say that specific deterrence and denunciation were not implicitly considered in the previous groups of cases. Rather, the courts explicitly considered specific deterrence and denunciation. In these cases, the courts used a retributive approach when assessing accountability. However, the goal was not simply to reflect retribution, as reasoned by the Ontario Court of Appeal, in *R v AO*. Rather, the punishment also served to warn the young person against further offending (specific deterrence) and to denounce their behaviour.

Denunciation and specific deterrence were given equal weight to retribution in *R v JM*, a Manitoba Court of Appeal decision. The court ruled that:

His moral culpability [was] extremely high, the intentional risk taking of continuing to assault Mr. Olson especially considering his age, Mr. Olson's inability to defend himself, duration of the beating, seriousness of the beating, and complete lack of

¹⁸⁸ *Ibid* at para 31.

response to any member of the public, or police whose presence should have abated his behaviour is profoundly concerning. This absolute lack of control reflects risk taking beyond measure. The consequential harm caused by J.M. is self evident and has been previously addressed in these reasons. His behaviour is profoundly offensive to societal values.¹⁸⁹

Justice Pullan further stated:

This is one of those cases... where *the seriousness of the offence involving violent crime is very difficult for the youth justice court judge to impose a proportionate sentence without giving appropriate weight to the objectives of denunciation and/or specific deterrence* [emphasis added].¹⁹⁰

The Manitoba Court of Appeal dismissed the appeal.

Similarly, in *R v ZH*, an Ontario Court Justice decision, the court stated:

In this case, the gravamen of the offence is extremely high. In addition, Mr. Z.H.'s degree of moral blameworthiness is equally high. On the strength of the evidentiary record before me, his prospects for rehabilitation are limited. The aggravating features of this case are such that a youth sentence would be insufficient in length to *denounce* [emphasis added] Mr. Z.H.'s unlawful conduct and would fall short of adequately reflecting an acknowledgement of the harm he has done to our community.¹⁹¹

Further, the court stated “the evidence before me supports the inference that no youth sentence imposed to date appears to have contributed to Mr. Z.H.’s rehabilitation or

¹⁸⁹ JM *supra* note 163 119 at para 250-251

¹⁹⁰ *Ibid* at para 256.

¹⁹¹ *R v ZH* 2019 OJ 5817 2019 ONCJ 817 at para 123 [ZH].

operated to *deter* [emphasis added] his commission of violent offences.¹⁹² The suggestion in this instance is that to hold the young person accountable, the punishment must be denunciatory and deterrent.

This theme (deterrence and denunciation were given equal weight to retribution) was also seen in *R v SWP*, a British Columbia Provincial Court decision. The court noted the 2012 amendments, specifically the addition of denunciation and specific deterrence, stating:

I have also taken into account the principles set out in s. 38 of the *YCJA*. In evaluating the weight to be attached to those principles, I am satisfied that there must be particular emphasis on the seriousness of the index offences for which the Respondent bears a high degree of responsibility. As such, I am satisfied that there must be an emphasis on the principle of denunciation in relation to the Respondent's unlawful conduct and, hopefully, by doing so, to deter the Respondent from committing future violent sexual offences.¹⁹³

In *R v JW*, an Alberta Provincial Court decision, rehabilitation was assigned a secondary importance to retribution, specific deterrence, and denunciation. The court was of the view that JW's "greatest risk of reoffending was linked to a possible relapse of substance abuse".¹⁹⁴ As stated by the court:

I accept that the Young Person is remorseful. I believe that if he could undo all of this, he would. I accept that for a long time, he could not confront what he had done. I accept that he had difficulty comprehending that he could be capable of such an unspeakable act. I am glad that he is ashamed of what he did -- because shame and remorse are the starting point for his rehabilitation. He now knows that this is something that he is capable of doing. What a terrible revelation that is to

¹⁹² *Ibid* at para 120.

¹⁹³ *R v SWP* 2018 BCJ 625 2018 BCPC 71 at para 174.

¹⁹⁴ *R v JW* 2014 AJ 1182 116 WCB (2d) 662 at para 53

have to live with. But it is my hope that the horror of his own actions while under the influence of substances will be an incentive to not fall back into that pattern.¹⁹⁵

The court had accepted that JW was remorseful for his offending behaviour. Further, JW had made significant strides in his rehabilitation. As stated by the court:

Truly, J.W. has demonstrated remarkable diligence in rehabilitating himself while in custody. In many respects, he has been a model prisoner. The steps that he has taken suggest that the hope that he will become a productive, contributing member of society one day is not misplaced.¹⁹⁶

The court in accepting the joint submission where the application for an adult sentence was unopposed, placed greater weight on deterrence, denunciation, and retribution than to JW's rehabilitative needs. As stated by the Alberta Provincial Court:

The joint submission, in my view, is not unreasonable. What has been proposed is a fit sentence for these offences. It is *denunciatory and proportionate to the seriousness of the offence* [emphasis added]. It recognizes the serious impact this has had on the complainant. It adequately reflects the repugnance with which society views a crime of this nature. A sentence of this length will be *deterrent to both this offender* [emphasis added] and to others in the community.¹⁹⁷

The courts, in the next decision, *R v Lucaissie*, did not directly reference specific deterrence and denunciation. As is the case with content analysis, some themes are harder to identify because they are based on the latent content of the texts and, therefore, inferences were drawn from the discourse. Similar to the previous decision, the court gave greater weight to deterrence, denunciation, and retribution than to his rehabilitative needs.

¹⁹⁵ *Ibid* at para 54.

¹⁹⁶ *Ibid* at para 39.

¹⁹⁷ *Ibid* at paras 55 and 56.

Lucaissie was convicted of a number of offences, the major offence being break and entry and sexual assault with a weapon.¹⁹⁸ Lucaissie, according to the court “ha[d] [since the offence] both matured, and largely, reformed. He [was] still, however, as is born out in the psychiatric assessment and testimony, a significant risk to re-offend.”¹⁹⁹ The court in considering whether a youth sentence would be long enough to hold Lucaissie accountable stated:

I have no doubt, in light of the evidence we have seen about Sam’s progress at the youth center, that a sentence of youth custody of three years would promote Sam’s rehabilitation and reintegration into society. I do not believe, however, that such a sentence would, in the words of section 72(1)(b) be of “sufficient length to hold [Sam] accountable for his ... offending behaviour.” It would, in my view, *send the wrong message to him – namely, that the offence he committed was not a major crime* [emphasis added].

While the court did not directly reference denunciation, one can infer from the above emphasized statement that in the Youth Justice Court of Nunavut, in determining that a youth sentence would not hold Lucaissie accountable was sending a message of society’s censure of his offending conduct. Accountability in this regard encompassed the notion of denunciation. Since Lucaissie had matured and largely reformed himself, rehabilitative needs were not an integral consideration in the accountability inquiry. He was, however assessed as being “a significant risk to reoffend”²⁰⁰. Thus, one can infer that a youth sentence would not be long enough to deter Lucaissie from re-offending. Accountability, while not directly stated, includes an element of specific deterrence. After all, regardless of the fact that Lucaissie had both matured and reformed he was still assessed at a significant risk to reoffend. The Youth Justice Court of Nunavut appears to have justified

¹⁹⁸ *R v Lucassie* 2013 NuJ 8 2013 YJCN 1 at para 8 [Lucassie].

¹⁹⁹ *Ibid* at para 101.

²⁰⁰ *Ibid* at para 8.

an adult sentence to both to denounce the behaviour and to effectively deter him from future offending.

In *R v NA*, a Manitoba Court of Queen's Bench decision the court considered deterrence and denunciation in the accountability inquiry. Specific deterrence and denunciation were assigned to a secondary importance to rehabilitation. Public safety was equally important as public interest. The Manitoba Court of Queen's Bench, in considering whether specific deterrence was a necessary consideration in the accountability prong directly stated that "specific deterrence [was] not required in this case".²⁰¹ Further, denunciation was not a necessary consideration in the accountability prong. As stated by the Manitoba Court of Queen's Bench:

Taking into consideration the fact that N.A. did not initiate the confrontation and has been found to be a very low risk to reoffend, I am satisfied that it would not be in the public interest to further incarcerate him. He has served the equivalent of nine months in pre-trial custody at the Manitoba Youth Centre and has since that time been on very strict bail for close to two years. Denunciation, in my view, does not require that N.A. be incarcerated again. In any event, denunciation is only a sentencing objective that may be considered.²⁰²

Greater weight was placed on NA's rehabilitation. In referencing the pre-sentence report, the Manitoba Court of Queen's Bench stated:

The pre-sentence report also shows someone who takes full responsibility for his actions. N.A. verbalized that arming himself on the day in question was an unreasonable action to take. He went on to indicate that he cannot fully appreciate the despair his victim's mother and brother feel and that it would feel wrong to say that he knows how they feel. Nonetheless, N.A. told the probation officer that he

²⁰¹ *R v NA* 2018 MJ 160 2018 MBQB 93 at para 35 [NA].

²⁰² *Ibid* at para 37.

understands that their lives changed forever as a result of his actions and that B.'s mother "lost a part of her".²⁰³

Further, while in pre-trial custody, NA had taken great strides to rehabilitate himself. As recognized by the Manitoba Court of Queen's Bench "While N.A. was in custody at the Manitoba Youth Centre, there were no behavioural issues whatsoever."²⁰⁴ Further, "No substance abuse issues were identified, and it is clear that, for the most part, N.A. has made good peer choices in the past".²⁰⁵

In summary, these six decisions suggest that the addition of denunciation and specific deterrence in the amended section 38(2)(f) have had an effect on the accountability inquiry, under section 72(1)(b). The results in this group of decisions reveal the interplay between retribution and considerations of specific deterrence, denunciation, and rehabilitation in the accountability inquiry.

²⁰³ *Ibid* at para. 7.

²⁰⁴ *Ibid* at para. 9.

²⁰⁵ *Ibid* at para. 9.

Chapter 7

7 Conclusion

The notion of accountability is mentioned in the Preamble and in three of the most significant decisions to be made under the YCJA: whether to divert the young person away from the court (section 4),²⁰⁶ whether to impose a custodial sentence (section 38), and lastly whether to sentence a young person as an adult (section 72).²⁰⁷ Whether to hold a young person as criminally accountable as an adult and if so in what form and to what degree, lies at the heart of section 72(1).²⁰⁸ The meaning of accountability under section 72(1)(b) is the central focus of this study. As outlined throughout this paper accountability is not defined in the Act, and as such it is within the courts' jurisdiction to determine its meaning.

What does it mean to hold a young person accountable for their offending behaviour when they engage in behaviour that is egregious enough to warrant an adult sentence? To answer this question this study has examined how youth court justices across Canada have interpreted and applied the meaning of accountability within section 72(1)(b) after the 2012 amendments brought forth under Bill C-10, the SSCA. This study examined judicial decisions, post the 2012 amendments, to determine what drives the accountability analysis under section 72(1)(b). I asked if accountability was equated to retribution as reasoned by the Ontario Court of Appeal, in *R v AO*? Additionally, has the introduction of specific deterrence and denunciation under section 38(2)(f) had an effect on the accountability analysis under section 72(1)(b)?

²⁰⁶ The courts and law enforcement agents, in Part 1 of the YCJA, are provided with more options for diverting young offenders away from the judicial system, especially first-time offenders and those engaging in minor offences. See: Bala *supra* note 4.

²⁰⁷ Thorburn *supra* note 8.

²⁰⁸ Brock Jones, "Accepting That Children are not Miniature Adults: A Comparative Analysis of Recent Youth Criminal Justice Developments in Canada and the United States" (2015) 19 CCLR at page 96.

As outlined earlier, under the framework of section 72(1)(b), the core determinant of whether a youth sentence is sufficiently long enough is “accountability”. Section 72(1) states:

The youth justice court shall order an adult sentence be imposed if it is satisfied that

- (a) the presumption of diminished moral blameworthiness or culpability of the young person is rebutted; and
- (b) a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not be of sufficient length to hold the young person accountable for his or her offending behaviour.

To rebut the presumption under section 72(1)(a), the Crown must satisfy to the court that the evidence supports a finding that the young person demonstrated a level of maturity, moral sophistication and capacity for independent judgement of an adult, at the time of the offence.²⁰⁹ It is only when the Crown rebuts the presumption under section 72(1)(a), that a young person is deemed to have the same level of moral blameworthiness as an adult. The courts are then asked to consider whether a young person sentence is of sufficient length to hold the young person accountable for their offending behaviour, under section 72(1)(b).

As outlined in Chapter 3, the Ontario Court of Appeal in *R v MW* held that the amendments to section 72 were substantive; that is section 72 became a “two-pronged test” rather than a “blended test”. This two-step inquiry has been endorsed by other courts. While it is clear from the case law that section 72(1) is to be considered a two-pronged test, an unanswered question remained: What does it mean under section 72(1)(b) to hold a young person accountable for their offending behaviour when they engage in behaviour that is egregious enough to warrant an adult sentence?

²⁰⁹ *MW supra* note 22 at para 98.

As I have shown and investigated throughout this paper, the case law from the Supreme Court of Canada *R v BWP* and the Ontario Court of Appeal *R v AO* have been and continue to be of assistance to youth court judges looking to understand the meaning of accountability within the context of section 3, 38, and 72. The courts before and after the 2012 amendments have continued to look to *R v AO* and to a lesser extent *R v BWP* as authoritative guidance when considering the meaning of accountability under section 72(1)(b).

In *R v BWP*, the Supreme Court of Canada held that the principle of accountability in the YCJA mandated an approach to sentencing that is “offender centric” and which excluded the sentencing principles of both specific and general deterrence and denunciation.²¹⁰ The Ontario Court of Appeal in *R v AO* addressed the meaning of accountability under Section 72 of the YCJA and reasoned that accountability is equivalent to retribution. Retribution reflects the moral culpability of the offender, having regard to the intentional risk-taking, consequential harm, and the normative character of the offender’s conduct.²¹¹ In line with the Supreme Court of Canada, *R v BWP*, the Appeal Court held that deterrence (specific and general) and denunciation are not considerations under accountability. Considerations as to the normative character of the offender’s conduct requires the court to consider societal values, but without adding an element of denunciation or deterrence (specific and general).²¹²

Of the 55 young persons in the sample of cases, the Crown did not rebut the presumption in section 72(1)(a) in 25 (45.5%) cases, as such section 72(1)(b) was not considered. These cases were excluded from the qualitative analysis for two reasons: 1) the courts did not consider the application of section 72(1)(b), or 2) the courts’ references to accountability under section 72(1)(b) were obiter dicta. Of the 55 decisions in this sample, in 30 (54.5%) the Crown rebutted the presumptive prong under section 72(1)(a)

²¹⁰ *BWP supra* note 2.

²¹¹ *AO supra* note 6 at para. 47.

²¹² *Ibid* at para 48.

and, therefore, section 72(1)(b), the accountability prong was considered. It was these 30 decisions that were the focus of the qualitative analysis.

The qualitative results of this study revealed three sets of cases. In all three groups weight was given to retribution, as reasoned by the Ontario Court of Appeal in *R v AO*, in the accountability analysis under section 72(1)(b). However, the weight given to retribution differed. In some cases, retribution was given greater weight to the rehabilitative needs of the young person and in other cases the rehabilitative needs of the young person were given equal to or greater weight to retribution.

The courts in the first set of cases placed greater weight on retribution. Little to no weight was given to the rehabilitative needs of the young persons as compared to what was given in the second group of cases. Even when the prospects for rehabilitation were positive and the offender was at a lower risk to reoffend, rehabilitative needs carried little to no weight in the accountability analysis. I submit and will argue when the courts take a narrow definition of accountability, giving little to no weight to rehabilitation, they are not properly balancing and considering the overall objective of the YCJA, which is to hold young persons accountable for their offending behaviour while ensuring their rehabilitation and the safe reintegration into society.

In the second group the courts reasoned that weight must also be given to public safety. I submit and will argue that the decisions in the second group are applying the proper interpretation of accountability. Public safety in this set of cases was synonymous with the courts' assessments of the young person's rehabilitative prospects and risk to reoffend. It is in this set of cases that both retribution and the rehabilitative needs of the young person were properly balanced considerations under the accountability inquiry.

In the first and second group of cases, the courts did not make explicit reference to specific deterrence and denunciation. In the third group, we see the addition of specific deterrence and denunciation in the amended section 38(2)(f) having an effect on the accountability inquiry. In my opinion specific deterrence and denunciation should not play a role or at least should play a secondary role in the accountability inquiry. Specific deterrence and denunciation are discretionary rather than required principles, as they

“may” [not must] be a consideration under section 38(2)(f). Second, the consideration of specific deterrence is inconsistent with the direction under section 72(1)(b) which directs the court to consider section 3(1)(b)(ii). Third, considerations of specific deterrence are contrary to scholarly research²¹³.

I submit and will argue in the following section that the second group of cases apply the proper interpretation and application of accountability under section 72(1)(b). To provide support for my argument, I will give a short summary of each group of cases and my evaluation of the courts’ interpretation and application of accountability.

7.1 What is the Proper Interpretation and Application of Accountability?

7.1.1 Group 1: A Narrow Interpretation of Accountability

The first set of cases included 8 (26.7%) of the 30 decisions. In this set of cases, the courts reasoned that greater weight should be placed on retribution in the accountability analysis. Accountability in this set of cases was equated to the adult sentencing principle retribution as reasoned by the Ontario Court of Appeal in *R v AO*. To hold a young person accountable, the offender’s sentence reflected the moral culpability of the offender, having regard for the intentional risk-taking, the consequential harm caused, and the normative character of the offender’s conduct.²¹⁴ The severity of the sanction was

²¹³ Anthony N. Doob, V Marinos and K N Varma, “Youth Crime and the Youth Justice System in Canada: A Research Perspective” (1995) National Criminal Justice Reference Service 56 [Doob, Marinos, Varma]; Steven P. Lab & John T. Whitehead, “From Nothing Works to the Appropriate Works: The Latest Stop on the Search for the Secular Grail” (1990) 28:3 *Criminol* 405 [Lab & Whitehead]; Mark W Lipsey & Francis T Cullen, “The effectiveness of correctional rehabilitation: a review of systematic reviews” (2007) 3 *Annual Review of Law & Social Science* 297 [Lipsey and Cullen]; Rolf Loeber and David P Farrington, “Never too early, never too late: Risk factors and successful intervention for serious and violent offenders” (1998) 7:1 *Studies on Crime Prevention* 7 [Loeber & Farrington]; Tustin & Lutes *supra* note 7; Sanjeev S Anand, “Preventing Youth Crime: What Works, What Doesn’t, and What it all Means for Canadian Juvenile Justice Policy (1999) *Queen’s LJ* 177 [Anand]; Mark W Lipsey, “Revised: Effective use of the large body of research on the effectiveness of programs for juvenile offenders and the failure of the model programs approach” (2020) 19:4 *Criminology & Public Policy* 1329 [Lipsey].

²¹⁴ *AO supra* note 6 at para 47

proportionate to the severity of the offending behaviour and less to no weight was given to the rehabilitative needs of the young person and the young person's risk to reoffend.

A narrow interpretation of accountability under section 72 as being equivalent to the adult sentencing principle of retribution may be the proper interpretation of accountability if the only legitimate grounds for punishment is to communicate a message of censure that the offender deserves, for the wrong committed, the severity of the sanction imposed.²¹⁵ I respectfully disagree with a narrow interpretation of accountability that is only concerned with retribution. This approach excludes considerations of rehabilitation and reintegration and the overall objective of the YCJA and the central purpose of sentencing, under section 38, which connects accountability to meaningful consequences (e.g., proportionate sanctions) and the rehabilitation and safe reintegration of young persons.²¹⁶

The case law developed in the first set of cases focused primarily on the requirement that accountability translates into retribution and pushes aside the consideration of whether the length of the sentence is conducive to the rehabilitation and reintegration of the young person. The results revealed that even when the young persons had rehabilitated, or their rehabilitative progress was well underway, and they posed a lower risk to reoffend, it was not deemed enough to lessen the weight of retribution. Further, in two (*R v TG* and *R v IKG*) decisions²¹⁷ the court recognized the adult facility setting where they would be incarcerated could have a negative impact on the young person's rehabilitative prospects. Yet, the rehabilitative needs for the two offenders (TG and IKG) was not enough to carry more weight than retribution.

Another example of a narrow interpretation of accountability can be seen in *R v KM*. The Northwest Territories Supreme Court could not overlook the seriousness of the offence,

²¹⁵ Thorburn *supra* note 8 at page 319

²¹⁶ Thorburn *supra* note 8; YCJA *supra* note 1; YCJA *supra* note 1 s. 38.

²¹⁷ See TBK *supra* note 137; IKG *supra* note 137.

even if a youth sentence would be favourable for KM's rehabilitation and reintegration into society. As stated by the court:

K.M.'s crime was the most serious known to our law [“this murder was particularly horrific, senseless, and brutal”²¹⁸]. His victim was a relative, an aboriginal woman from their aboriginal community. The crime had a profound impact on that community. The principles articulated in the Supreme Court of Canada in *Gladue* and *Ipeelee*, important as they are do not reduce K.M.'s blameworthiness to the point that a youth sentence can adequately address the need to hold him accountable for his actions.²¹⁹ *Even if I had concluded that a youth sentence would be sufficient to foster K.M.'s rehabilitation and provide reasonable assurances that he can be safely reintegrated into the community, I would nonetheless have imposed an adult sentence in this case because I am profoundly convinced that a youth sentence would not reflect the seriousness of his crime* [emphasis added]. I am persuaded that such a sentence would not, fundamentally, be just.²²⁰

To summarize, the courts in the first group of cases have applied a narrow interpretation of accountability as reasoned by the Ontario Court of Appeal in *R v AO*. In my opinion, the courts have not interpreted and applied the proper meaning of accountability under section 72(1)(b) as they have not properly balanced the overall objective of the YCJA and the central purpose of sentencing as is mandated by section 72(1)(b). I submit and will argue that the proper interpretation and application of accountability under section 72(1)(b) is reflected in the second group of cases.

²¹⁸ KM *supra* note 131 at para 180.

²¹⁹ *Ibid* at para 193.

²²⁰ *Ibid* at para 179.

7.1.2 Definition of Accountability Broadened to Include Public Safety

The second set of cases included 16 (53.3%) of the 30 cases. In this group of cases the courts reasoned that weight also must be given to public safety. This is not to say that retribution and other factors were not a consideration. Rather, public safety played equal or greater importance to retribution. Public safety was synonymous with the courts' assessments of the young persons' rehabilitative prospects and risk to reoffend. In the second set of cases, the courts properly considered the young person's rehabilitative needs.

Retribution was not the only determining factor to the accountability inquiry mandated by sections 72(1)(b). Instead, retribution served as a sort of an anchor for the sentencing process.²²¹ The decisions in the second group did not take a narrow interpretation of accountability as reasoned by *R v AO* and as reflected in the decisions in the first group. Rather, the courts have broadened the definition of accountability to include public safety and in doing so have given equal and in some cases greater weight to the rehabilitative needs of the young persons. In my opinion, the courts have engaged in the proper interpretation and application of accountability as reflected in their concern not only with the seriousness of the young person's offending behaviour but also with the young persons' rehabilitation and reintegration into society, as components of holding young persons accountable.²²²

This interpretation and application of accountability is consistent with the overall goals and objectives under the YCJA. It also reflects a broader interpretation and application of accountability as reasoned by Ontario Court of Appeal decision *R v AO*. As outlined in Chapter 4, the Court of Appeal in *R v AO*, endorsed that "accountability is to be achieved

²²¹ Henderson *supra* note 59 at para 68.

²²² Thorburn *supra* note 8 at page 315.

through the imposition of meaningful consequences for the offender and sanctions that promote his or her rehabilitation and reintegration into society”.²²³ As stated by the court:

The combined effect of ss. 72, 3 and 38 is to identify accountability as the purpose that the youth court judge must consider when deciding an application to impose an adult sentence on a young person. Accountability is achieved through the imposition of meaningful consequences for the offender and sanctions that promote his or her rehabilitation and reintegration into society.”²²⁴

In consideration of this statement, the Court of Appeal cited the Ontario Superior Court of Justice decision *R v Ferriman*,²²⁵ which held that to hold a young person accountable a youth sentence must satisfy two objectives: 1) It must be long enough to reflect the seriousness of the offence and the young person’s role in it, and 2) It must be long enough to provide reasonable assurance of the young person’s rehabilitation to the point where they can safely reintegrate into society.²²⁶ Yet, the Appeal Court focused primarily on retribution despite endorsing that accountability is achieved through the imposition of meaningful consequences that promote young persons’ rehabilitation and reintegration into society.

The courts in this set of cases accepted *R v AO*’s definition of accountability as being equated to retribution but broadened the definition to include public safety thereby endorsing that accountability is achieved through meaningful consequences that promote the young persons rehabilitation and reintegration into society.

One example of the courts giving equal weight to retribution and rehabilitation when considering whether a youth sentence would be of sufficient length to hold the young person accountable is *R v Choi*, the British Columbia Supreme Court decision. The court

²²³ *Ibid* at para 42.

²²⁴ *Ibid* at para 42.

²²⁵ *Ferriman supra* note 24.

²²⁶ *Ibid*.

gave equal weight to rehabilitation and retribution when reasoning that a youth sentence would neither be of sufficient length to hold Choi accountable for the seriousness of the offence, nor would be long enough to ensure that he would be successfully rehabilitated and reintegrated into a law-abiding life.²²⁷ This theme also appeared in other decisions. For example, in *R v Okemow*, the Manitoba Court of Appeal stated:

The judge's [trial judge] reasons show that, on the question of proportionality, she was concerned about the seriousness of the offences and the young person's high moral blameworthiness. On the question of rehabilitation, she was concerned that his aggressive personality, other risk factors and lack of progress despite a lengthy period of presentence custody made his prospects for rehabilitation and reintegration into the community dim. Taking these considerations together, she concluded that protection of the public could not be achieved by a youth sentence.²²⁸

In other decisions rehabilitation was given greater weight to retribution. In *R v Henderson*, greater weight was placed on rehabilitation than retribution. As stated by the Saskatchewan Provincial Court:

Given the seriousness of the offence and the degree of responsibility that Jacqueline bears for it, a youth sentence would not be proportional response. *Moreover, a youth sentence would not be long enough to provide reasonable assurance of Jacqueline's rehabilitation to the point where she can be safely reintegrated into society* [emphasis added].²²⁹

Another example of the court giving greater weight to rehabilitation was reflected in the Ontario Court of Justice, *R v MG*, in which the court acknowledged that MG was assessed as being high risk to reoffend. The court considered and balanced section 3, 38,

²²⁷ Choi *supra* note 84 at para 132.

²²⁸ Okemow *supra* note 82 at para 92.

²²⁹ Henderson *supra* note 59 at paras 73 and 74.

and 72 and held that the best protection the public had from MG committing further racist or violent acts would be the type of intensive counselling and support that had been put in place during his pre-sentence custody.²³⁰

In summary, the courts in this set of cases accepted *R v AO*'s definition of accountability as being equated to retribution but broadened the definition to include public safety thereby endorsing that accountability is achieved through meaningful consequences (proportionate sanctions) that promote the young persons rehabilitation and reintegration into society.

7.1.3 Introduction of Specific Deterrence and Denunciation Under Section 38(2)(f)

This study asked whether the introduction of specific deterrence and denunciation under section 38(2)(f) brought forth by Bill C-10 would have an effect on the accountability inquiry under section 72(1)(b). In the third set of cases, which included six (20%) decisions we see that the introduction of specific deterrence and denunciation is having an influence on the accountability analysis. In this set of cases, the courts reasoned that weight also must be given to specific deterrence and denunciation in the accountability analysis. This is not to say that retribution and public safety did not play a role, rather, the courts explicitly referenced specific deterrence and denunciation when engaging in the accountability inquiry.

In my opinion specific deterrence and denunciation, under section 38(2)(f) should not play a role, or at least should play a secondary role to retribution and rehabilitation, under section 72(1)(b). The consideration of specific deterrence imposes an element of autonomous choice.

Consider that to rebut the presumption under section 72(1)(a) the Crown must satisfy to the court that the evidence supports a finding that the young person *demonstrated a level*

²³⁰ AG *supra* note 180 at para 84.

*of maturity, moral sophistication and capacity for independent judgement of an adult.*²³¹ Once the presumption is rebutted youth court justices must then engage in the accountability inquiry under section 72(1)(b). Section 72(1)(b) mandates that the courts are to determine whether a youth sentence is of sufficient length to hold the young person accountable in accordance with section 3(1)(b)(ii) and section 38. Section 3(1)(b)(ii) emphasizes “fair and proportionate accountability that is consistent with the *greater dependency of young persons and their reduced level of maturity* [emphasis added]”.²³²

The implicit rational choice²³³ presumption [that underlies the principle of deterrence] would require youth court justices to consider a principle of sentencing (specific deterrence) that is inconsistent with young persons diminished moral blameworthiness as mandated by section 72(1)(a) and young persons’ greater dependency and reduced level of maturity as mandated by section 3(1)(b)(ii). Despite a court’s finding that the Crown has rebutted the presumption of diminished moral blameworthiness under section 72(1)(a), the courts must then consider whether the length of the youth sentence would be consistent with the greater dependency of young persons and their reduced level of maturity. It would seem logical that the direction to refer to section 3(1)(b)(ii) should be interpreted to exclude the consideration of specific deterrence as any consideration of specific deterrence would be inconsistent with the reduced maturity of the young person.

I draw support for my argument by social science research²³⁴ which has shown that “young persons do not, generally speaking, rationally consider and weigh the risks of being apprehended for their crimes”²³⁵. This view is also reflected in the Canadian Bar

²³¹ SB *supra* at note 79.

²³² YCJA *supra* note 1.

²³³ The assumption that young persons will consider and weigh the risks of being apprehended for their crimes against the benefits of engaging in the offending behaviour.

²³⁴ Doob, Marinos, Varma *supra* note 210; Lab & Whitehead *supra* note 210; Lipsey & Cullen *supra* note 210; Loeber & Farrington *supra* note 210; Tustin & Lutes *supra* note 7; Anand *supra* note 210; Lipsey *supra* note 210.

²³⁵ Tustin & Lutes *supra* note 7; *Ibid.*

Association (CBA) who have commented on government proposals to reform the youth criminal justice system over the past several years. The CBA states:

For immature offenders unable to anticipate or appreciate consequences in the same way that adults do, it is particularly troubling that this principle [specific deterrence] would be grafted onto an otherwise progressive sentencing regime. This amendment would offer judges considering the imposition of a jail sentence a “peg to hang their coat on.”²³⁶

Lastly, the consideration of specific deterrence and denunciation are discretionary under section 38(2)(f) as they “may”, not must, be objectives of sentencing. This view is reflected in *R v NA*, the Manitoba Court of Queen’s Bench decision. In this decision, the court considered specific deterrence and denunciation under the accountability inquiry. In this instance, specific deterrence and denunciation were assigned to a secondary importance to rehabilitation. The Manitoba Court of Queen’s Bench, in considering whether specific deterrence was a necessary consideration in the accountability prong directly stated that “specific deterrence [was] not required in this case”.²³⁷ Further, the court directly stated “denunciation [similar to specific deterrence] is only a sentencing objective that may [not must] be considered”.²³⁸ As stated by the Manitoba Court of Queen’s Bench:

Taking into consideration the fact that N.A. did not initiate the confrontation and has been found to be a very low risk to reoffend, I am satisfied that it would not be in the public interest to further incarcerate him. He has served the equivalent of nine months in pre-trial custody at the Manitoba Youth Centre and has since that time been on very strict bail for close to two years. Denunciation, in my view, does

²³⁶ Canada, The Canadian Bar Association, *Bill C-4 – Youth Criminal Justice Act Amendments*, (National Criminal Justice Section Canadian Bar Association, 2010) at 5 online: <https://www.cba.org/CMSPages/GetFile.aspx?guid=dc0011af-0d84-4b15-805e-5ad44c476ba7>.

²³⁷ *NA supra* note 198 at para 35.

²³⁸ *Ibid* at para 37.

not require that N.A. be incarcerated again. In any event, *denunciation is only a sentencing objective that may be considered* [emphasis added].²³⁹

7.2 Limitations of Study and Future Research

The sample of cases used in this study were obtained from Quicklaw. However, the decisions obtained in Quicklaw are not representative of all cases that appear before the court. As such, one of the limitations of this study is that the decisions included in the analysis are not an unbiased sample of the range of cases that come before the court. While the qualitative results of this study have demonstrated the trends in the development of law under section 72 of the YCJA, post the 2012 amendments, the sample of cases is small, which limited more sophisticated quantitative analysis and statistical significance. Further, the cases did not provide enough information to make a comparison between genders as there were few reported cases of young female offenders and minority youth in this sample of cases.

For future research, this study can be expanded in many possible directions. Two possible expansions could be as follows: First, research on judicial decisions using a more representative sample. A more representative sample from a larger pool of cases than I had access to in Quicklaw, would be important for testing various theoretical perspectives, such as theories of retribution, deterrence, and rehabilitation. A larger sample would lead to a more representative result. Second, the results of this study indicate that assessments of diminished blameworthiness under section 72(1)(a) play an integral role in determining whether a youth sentence will be long enough to hold a young person accountable under section 72(1)(b). In the 30 decisions where the Crown rebutted the presumption under section 72(1)(a) the courts held that a youth sentence would not be of sufficient length to hold the young person accountable in 27 (90%) of those cases. This finding leads to the question: Once the courts have determined that the young person has demonstrated a level of maturity, moral sophistication and capacity for independent judgement of an adult, at the time of the offence, under section 72(1)(a) can

²³⁹ *Ibid* at para 37.

they then consider the greater dependency and less maturity as required under section 3(1)(b)(ii), under section 72(1)(b)? An examination could be conducted to determine what factors shape assessments of moral culpability under section 72(1)(a) and whether this assessment has an effect on the accountability inquiry under section 72(1)(b).

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SOC2259: Sociology of Deviance (2 sessions)
SOC2260: Sociology of Law (13 sessions)
SOC2266: Introduction to Criminology (6 sessions)
SOC2267: Youth in Conflict with the Law (2 sessions)
SOC3327: Special Topics: Criminalization of Poverty (3 sessions)
SOC3340: Violence in Cultural Perspective (2 sessions)
SOC3357: Crime and Deviance in the Workplace (5 sessions)
SOC4437: Advanced Sociology of Deviance

Teaching Experience (December 2021 – present)

Western University
London, Ontario, Canada

PSYCH2032: Psychology of Crime and Corrections
PSYCH2550: Introduction to Personality Theory and Research

Teaching Experience (September 2015 - 2019)

Western University
London, Ontario, Canada

SOC2253: Administration of Criminal Justice (2 sessions)

SOC2266: Introduction to Criminology

SOC3260: Sociology of Law (4 sessions)

Publications and Conferences

Whitehead, Paul C. and Kobayashi, Brenda. (2014). "Alcoholism and Other Social Problems in Canadian Aboriginal Communities: Policy Alternatives and Implications for Social Action," in Trovato, Frank (ed.), *Aboriginal Populations – Social, Demographic, and Epidemiological Perspectives*, University of Alberta Press.

Kobayashi, Brenda. 2009. Bridging Divides in Canadian Criminology Conference. Western University. Chair for Panel of Presenters.

Kobayashi, Brenda. 2009. Parental Strain, School Strain and Delinquency: Does Parental Support Matter? Sociology Graduate Student Research Day.

Kobayashi, Brenda. 2008. Parental Strain, School Strain and Delinquency: Does Parental Support Matter? American Society of Criminology Annual Meeting, St. Louis, Missouri, U.S.